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**THE SUBSIDIARITY OF UNJUST
ENRICHMENT
ANGLO-FRANCO-SCOTS
PERSPECTIVES**

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DECLARATION

This thesis has been composed solely by me, and it has not been submitted, in whole or in part, in any previous application for a degree or similar. Except where otherwise stated, by reference, or other acknowledgement, the work presented is entirely my own.

Mat Campbell
Edinburgh, 10 December 2018

ABSTRACT

This thesis examines the supposed subsidiarity of unjust enrichment in English, French (ie, of the *action de in rem verso*, in the category of quasi-contracts), and Scots law. Its central argument is that the relations (i) of unjust enrichment with other areas of law, namely, special statutory regimes, property, contract, and tort/delict, and (ii) in French law, of the *action de in rem verso* with different quasi-contractual claims, cannot be explained on the basis that unjust enrichment, or elements thereof, are subsidiary to anything else. Various scholarly accounts are considered, along with primary materials. Chapter one summarises basic relevant features of unjust enrichment in each jurisdiction under consideration. Chapter two examines linguistic and contextual perspectives on subsidiarity (respectively, from Latin, English, and French, then from the Roman Catholic Church, European Union law, and European human rights law). From these perspectives are distilled six conceptual essentials of subsidiarity, which any use of subsidiarity must respect. Chapter three of the thesis explores the current position of subsidiarity in each jurisdiction under consideration, and why so many have that unjust enrichment is somehow subsidiary (the main reason being its extreme generality and consequent potential to upset the solutions provided, or refused, by other legal institutions). Subsequent chapters then apply the essentials distilled in chapter two to arguments that unjust enrichment is subsidiary, to statute, or property, for example. This analysis shows, not that unjust enrichment *should not* be subsidiary to the other institutions examined, but that it *cannot* be subsidiary to them. Alternative explanations of unjust enrichment's external and internal relations are put forward to replace subsidiarity. It is hoped that this will contribute to the disappearance of subsidiarity from unjust enrichment discourse, and foster a better understanding, both of unjust enrichment in general, and how its power can be controlled.

LAY SUMMARY

1. This thesis is about the way an area of law called unjust enrichment interacts with other areas of law in England, France, and Scotland. Different areas of law are not watertight from each other. But most people would accept that it is often worth seeing the law of contract, for example, as at least descriptively separate from the law of property. And when rules about contracts interact with rules about property, most people would accept that an understanding of this interaction, or any other interaction between areas of law, is worthwhile. So, when you buy a house, you get property rights from the seller. But there will also be a contract which actually transfers those property rights, and the transfer will then be registered. Here, contract is interacting with property, and the special rules about the registration of property transactions.

2. Unjust enrichment is (mostly) about the restoration to a person of a benefit which another person has obtained, in circumstances which the law says are unjust. One such circumstance is where a person makes a mistaken payment to another. This area of law, just like in our contract-property example, interacts with other areas of law, too. Many people – in legislatures, courts, legal practice, and university law schools – have tried to explain how unjust enrichment interacts with other areas of law. One way they have done this is to say that unjust enrichment is *subsidiary* to those other areas, or, to put it differently, that *subsidiarity* can help to explain unjust enrichment's relations with them. There are many details about subsidiarity as a concept, but it is basically about deciding that one person, group, or entity, etc, is not allowed to do certain things, when those same things could be done by another person, group, or entity, etc, unless a particular condition is satisfied. Precisely what that condition is depends on the precise notion of subsidiarity being considered. When it comes to the supposed subsidiarity of unjust enrichment, many people who say that unjust enrichment is subsidiary mean that you cannot use unjust enrichment to resolve your legal problem if another area of law can do it for you, or if another area of law which *could potentially* also do it for you, would *actually refuse* to do it for you.

3. Some of the other areas of law to which unjust enrichment has been said to be subsidiary include special statutory regimes (like those which govern the payment of company directors), the law of contract (the bulk of which is concerned with when and why promises must be kept, and what happens if they are not), and the law of wrongs (like negligence in English law, for example).

4. The main reason many people think that unjust enrichment is, or should be, subsidiary to other areas of law, is that unjust enrichment is a very broad principle of justice: if it is allowed too much leeway in our legal systems, then other areas of law, and the solutions to our legal problems which they provide, or refuse to provide, will be contradicted or otherwise upset, and that will be bad for everyone.

5. After providing, in chapter one, a basic summary of the law of unjust enrichment in England, France, and Scotland, outlining, in chapter two, some essential features of the concept of subsidiarity, and addressing, in chapter three, the reasons why many people invoke subsidiarity to explain unjust enrichment's relations with other areas of law, this thesis disagrees, in subsequent chapters, with everyone who thinks that unjust enrichment is subsidiary.

6. The thesis does this by examining lots of arguments about unjust enrichment's supposed subsidiarity to other areas of law (some of which are listed in paragraph 3, above), and applying to those arguments the essential features of subsidiarity which are outlined in chapter two. Doing this shows, not just that unjust enrichment *should not* be subsidiary to those other areas of law, which some people have argued before, but that it *cannot* be subsidiary to them. Alternative explanations of unjust enrichment's interactions with those other areas of law are then put forward, in the hope of fostering a better understanding of unjust enrichment, and how its power can be controlled.

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INTRODUCTION

The central question in this study is: what is the role of subsidiarity in unjust enrichment's interaction with other areas of law and legal institutions, and in the relations between different enrichment claims?¹ This introduction explains the value of our inquiry, and a comparative approach, examining English, French, and Scots law. It then surveys what follows, and clarifies relevant terminology.

I. SUBSIDIARITY

Subsidiarity merits investigation because of widespread claims that it is an essential condition of liability, or even structurally inherent, in unjust enrichment, and usefully bridles that powerful principle of law. We must know whether these claims are true. In England and Scotland, enrichment law is still developing.² Basic features of liability in unjust enrichment which we know to exist continue to require close attention.³ A *fortiori*, we must discover whether there are *other* such features. Super-structural questions persist.⁴ Progress towards answers must continue. In France, a major reform of the *Code civil* was adopted in 2016, then finalised, with amendments,⁵ in 2018.⁶ For the first time, the *action de in rem verso*, rechristened the *action en*

¹ We ignore whether unjust enrichment should *exist* in its current form. Relevant literature and authors are mentioned by S Hedley, "Farewell to Unjustified Enrichment?" – A Common Law Response' (2016) 20 Edinburgh L Rev 326, 327 and notes 7-16. See also, eg, IM Jackman, *The Varieties of Restitution* (2nd edn, Federation 2017) esp chs 1-2; R Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574. We also harbour no hopes of a harmonised European answer to our question. See *Tomášová v Slovak Republic (French text)* [2016] CJEU C-168/15 [37]-[41]: refusal to rule whether national legal systems' laws of torts take any sort of priority over their versions of the *condictio indebiti*.

² *Investment Trust Companies (in liq) v HM Revenue and Customs Commissioners* [2015] EWCA Civ 82, [2015] STC 1280 [46] (Patten LJ, with whom Moore-Bick and Beatson LJJs agreed); reversed on other grounds [2017] UKSC 29, [2018] AC 275; *Biffa Waste Services Ltd v Patersons of Greenoakhill Ltd* [2015] CSOH 137, 2015 GWD 34-548 [29] (Lord Woolman).

³ Eg, the 'at the expense of requirement': *HM Revenue and Customs v Investment Trust Companies* [2017] UKSC 29, [2018] AC 275 [37]-[38] (Lord Reed, with whom Lord Neuberger, Lord Mance, Lord Carnwath, and Lord Hodge agreed); highlighted in *Prudential Assurance Company Ltd v HM Revenue and Customs Commissioners* [2018] UKSC 39, [2018] 3 WLR 652 [67] (Lord Mance, Lord Reed, and Lord Hodge, with whom Lord Sumption and Lord Carnwath agreed).

⁴ HL MacQueen, 'The Future of Unjustified Enrichment in Scotland' [2017] RLR 14, 19-21.

⁵ As to which, see O Deshayes, T Genicon and Y-M Laithier, 'Ratification de l'ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations' [2018] JCP G 529.

⁶ Ordonnance n° 2016-131 du 10 February 2016 reforming the law of contracts, the general regime of obligations, and the proof of obligations; Loi n° 2018-287 of 20 April 2018 ratifying Ordonnance n° 2016-131 of 10 February 2016 reforming the law of contracts, the general regime of obligations, and the proof of obligations. For history and context, see further F Ancel, B Fauvarque-Cosson and G Gest, *Aux sources de la réforme du droit des contrats* (Dalloz 2017).

enrichissement injustifié, was codified, and its subsidiarity carried uncontroversially into the relevant provisions.⁷ These developments are an opportunity searchingly to analyse the law.⁸

II. COMPARISON

The general worth of comparative unjust enrichment scholarship is well established: in a difficult area, open-mindedness is prudent.⁹ More specifically, a comparative approach is of interest because French legal thought, which contains by far the longest relevant discourse about subsidiarity, has influenced, at least casually, the arrival and contours of subsidiarity in Anglo-Scots enrichment law and scholarship. Considering English, Scots, and French law, is advantageous. Each represents (what is usually thought to be) a different kind of legal system: common law, civil law, and mixed.¹⁰ This may permit our study to resonate more broadly than if it considered material from only one or two legal cultures. In a tentative effort to facilitate this, some reference is made in subsequent chapters to other common law systems, and South African law, to the learning of which English and Scots law are, respectively, particularly receptive.¹¹ Unfortunately, space has precluded treatment of Louisiana and Québec law, which might have shed light on both Scots and French law.¹²

⁷ *Code civil*, art 1303ff esp 1303-3.

⁸ On the '*nouvelle « exegèse »*', see F Chénéde, *Le nouveau droit des obligations et des contrats* (2nd edn, Dalloz 2018) [002.05].

⁹ P Birks, 'Comparative Unjust Enrichment' in P Birks and A Pretto (eds), *Themes in Comparative Law in Honour of Bernard Rudden* (OUP 2002) 150. Birks also drew attention to the value of a Scots perspective to English lawyers: 'Restitution: A View of the Scots Law' [1985] CLP 57, 57.

¹⁰ On the third of these, see generally V Palmer (ed), *Mixed Jurisdictions Worldwide* (2nd edn, CUP 2012).

¹¹ *Starbucks (HK) Ltd v British Sky Broadcasting Group PLC* [2015] UKSC 31, [2015] 1 WLR 2628 [50] (Lord Neuberger, with whom Lord Sumption, Lord Carnwath, Lord Toulson, and Lord Hodge agreed); D Carey Miller, 'Sibling Mixed Systems: Reviewing South African/Scottish Comparative Law' (2016) 20 *Edinburgh L Rev* 257.

¹² But see chapter 3, footnote 2, for some references. Contrary to some assumptions, French openness to comparative law is greater than might at first appear: B Fauvarque-Cosson, 'Deux siècles d'évolution du droit comparé' (2011) 63 *RIDC* 527; 'Lorsque le changement s'imposera' (2015) 10 *RD Assas* 188. But it is usually necessary to go beneath the surface, to see evidence that that academic work on foreign law is often used for inspiration in improving, harmonising or unifying the law: Y-M Laithier, *Droit comparé* (Dalloz 2009) 17-24. For foreign law in French courts, see A Albarian, 'The Use of Comparative Law before the French Cour de Cassation', and G Canivet, 'The Use of Comparative Law before the French Private Law Courts', both in A Albarian, M Andenas and D Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015).

III. OVERVIEW

Distinguished commentators have remarked that unjust enrichment ‘always seems to raise the issue of subsidiarity’.¹³ The consistent trend in material endorsing it is to the effect that subsidiarity is concerned with the constraint of enrichment claims in the presence or absence of another claim or legal institution (including, sometimes, other kinds of enrichment claim). Variations on this theme exist in English, French, and Scots law and commentary, further addressed throughout this study.

Many believe that our understanding of unjust enrichment’s relations with other areas of law and legal institutions is enhanced by recourse to the language of subsidiarity. With a minority of others, but at greater length,¹⁴ this study disagrees. No account surveyed correctly demonstrates unjust enrichment’s subsidiarity to anything else; rather, the material shows that the subsidiarity of unjust enrichment is impossible. Instead, as later chapters explain, where the operation of unjust enrichment is excluded, this is explicable for other reasons.

Chapters 1-3 address generalities about unjust enrichment, subsidiarity, and the status of, and reasons for, subsidiarity in unjust enrichment. Chapters 4-9 disprove claims about the subsidiarity of unjust enrichment. The study then concludes. A summary of each chapter follows.

1. Unjust enrichment

First, we sketch basic features relevant to this study of unjust enrichment in England, France, Scotland, and, where appropriate, other jurisdictions. We also reject a distinction between justifications for enrichments and impoverishments (in French law), and the view that, to be effective, a legal ground for an enrichment must confer

¹³ D Johnston and R Zimmermann, ‘Unjustified Enrichment: Surveying the Landscape’ in D Johnston and R Zimmermann (eds), *Unjustified enrichment: key issues in comparative perspective* (CUP 2002) 29.

¹⁴ Eric Descheemaeker, for example, briskly dispatches subsidiarity almost entirely (compare his account to chapter 8’s here), for reasons similar to those given here: ‘The New French Law of Unjustified Enrichment’ [2017] RLR 77, 91-93.

an entitlement to that enrichment. This brief survey, and explanations of two points of detail, provide clarity in later chapters.

2. Subsidiarity

Secondly, we examine subsidiarity, proceeding in two steps. First, a linguistic perspective is adopted. Dictionary definitions of the noun *subsidiarity* and the adjective *subsidiary* in Latin, English, and French are set out. From them are extracted points about the correct usage of subsidiarity. These are used as a framework in the second part of this chapter, which examines subsidiarity in three contexts – Roman Catholic social doctrine, European Union law, European human rights law – and draws on other material, including writing on subsidiarity in French private law. The chapter draws the threads together by setting out six principles to be respected by users of subsidiarity. These principles, which will be applied to the law and scholarship on the subsidiarity of unjust enrichment in later chapters, are the following.

(1) *Existence*. Once in place as an operative rule or principle, subsidiarity is not concerned to determine whether a given entity to which it applies actually exists.

(2) *Plurality*. A relationship of subsidiarity positively requires the existence of at least two entities, or groups of entities.

(3) *Overlap*. For a rule of subsidiarity to be relevant in any context, at least two entities in that context must be capable of overlapping if unrestrained.

(4) *Meta-authority*. For a rule of subsidiarity definitively to resolve questions of allocation and overlap, it must bind the relevant entities by constituting an independent, higher authority in relation to them.

(5) *Not sovereignty*. For a relationship of subsidiarity to exist, no entity said to be part of that relationship can be sovereign over any other entity in that relationship.

(6) *Not concurrence*. An extant relationship of subsidiarity is incompatible with the free concurrence of the entities said to be part of that relationship.

3. Subsidiarity in unjust enrichment

Thirdly, after addressing unjust enrichment and subsidiarity separately, we examine subsidiarity in unjust enrichment law and commentary. Across our three jurisdictions, the common reason for accepting subsidiarity is the power and generality of unjust enrichment: a perceived need to prevent its upsetting solutions provided by other legal rules. English law does not formally accept that unjust enrichment is subsidiary. But subsidiarity has a substantial foothold in mainstream scholarship, reinforced in part by reference to comparative sources, which might have been more critically engaged with. In France, and despite recently renewed periodic criticism, the subsidiarity of the *action en enrichissement injustifié* is firmly established in both law and commentary. Some corrections to the dominant historical narrative are, however, required. As for Scotland, subsidiarity's foothold in enrichment cases is modest, and the commentary engages critically, both with subsidiarity in Scotland, and available comparative material. But this has not prevented scholarly endorsements, which, though often partial, nevertheless abound; and the law may soon commit itself further than it already has.

4. Unjust enrichment, subsidiarity, and statute

Fourthly, we examine claims in French and Scots law and scholarship that unjust enrichment is subsidiary to statute. None survives the application of the principles developed in chapter 2: subsidiarity is not what any of them describes. The best explanation for unjust enrichment's contingency on the operation of statutes that exclude or limit enrichment claims is, simply, that statutes which do this *justify enrichments*, to which extent, there is no unjust enrichment to be subsidiary to anything.

5. Unjust enrichment, subsidiarity, and property

Fifthly, we consider claims in English scholarship, and in French law and scholarship, that unjust enrichment is subsidiary to the law of property. None survives the application of the principles developed in chapter 2: subsidiarity is not what any of them describes. All available accounts presuppose that retention of title scotches one

or more basic elements of liability in unjust enrichment, especially the requirement that any impugned enrichment be unjust. So, taking the accounts themselves at face value, subsidiarity is impossible and redundant in explaining enrichment's relations with property.

6. Unjust enrichment, subsidiarity, and contract

Sixthly, we analyse claims in English scholarship, and French and Scots law and scholarship, that unjust enrichment is subsidiary to the law of contract. None survives the application of the principles developed in chapter 2: subsidiarity is not what any of them describes. The best explanation for unjust enrichment's contingency on the operation of contracts that exclude or limit enrichment claims is that contracts which do this *justify enrichments*, to which extent there is no unjust enrichment to be subsidiary to anything.

7. Unjust enrichment, subsidiarity, and tort or delict

Seventhly, we encounter claims, found only in French law and scholarship, that unjust enrichment is subsidiary to the law of tort or delict. Those claims do not survive the application of the principles developed in chapter 2: subsidiarity is not what any of them describes. In any event, subsidiarity is irrelevant to the relationship of unjust enrichment and delict in France, because the institutions do not overlap with each other in their application to facts.

8. Unjust enrichment, subsidiarity, and obstacles of fact

Eighthly, we confront uniquely French claims about subsidiarity, in situations where an obstacle of fact bars a claimant's action against a primary debtor, and (i) an *action de in rem verso* is then allowed against an indirect party enriched, or (ii) where, at one time, an action against the primary debtor is barred by obstacle of fact, and an *action de in rem verso* is *later* allowed against *the same* debtor. No claim survives the application of the principles developed in chapter 2: subsidiarity is not what any of them describes. In fact, all of the cases supposedly applying what we will call the obstacle of fact permission in a claimant's favour are simply straightforward cases of

unjustified enrichment, in which there is no objection based on grounds of coherence in the law to the doctrine's operation. In fact, they are quite unremarkable.

9. Subsidiarity within the law of unjust enrichment

Ninthly, we challenge claims in French law and Scots scholarship, respectively, that the *action en enrichissement injustifié* is subsidiary to other kinds of claim falling into the category of quasi-contract (*la catégorie quasi-contractuelle*), and that the general principle against unjust enrichment is somehow subsidiary to other kinds of enrichment claim. No claim survives the application of the principles developed in chapter 2: subsidiarity is not what any of them describes. But this does not matter. First, in France, the different conditions of liability in *negotiorum gestio* and *enrichissement injustifié* prevent them from overlapping, such that subsidiarity is irrelevant to their relations. And to the extent that they can overlap, the primacy of France's *condictio indebiti* over *enrichissement injustifié* can be explained with the maxim *specialia generalibus derogant*. Secondly, in Scotland, the account to be analysed inaccurately presents the law. And, if it were correct, it would be liable to rejection for its failure to improve legal certainty – the only reason for its being proffered – concomitant with its potential seriously to worsen Scots enrichment law.

IV. TERMINOLOGY

From now on, when reference is made to enrichment law and scholarship in a single legal system, generally accepted terminology for that system's enrichment law is employed: unjust enrichment for England; unjustified enrichment, *enrichissement injustifié*, *enrichissement sans cause*, and *action de in rem verso*, for France; and unjustified enrichment for Scotland. The phrase *unjust enrichment*, or simply the word *enrichment*, are also used to refer simultaneously to relevant law in multiple jurisdictions.

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CHAPTER 1

UNJUST ENRICHMENT

This first chapter addresses unjust enrichment in four parts. The first three are general, and sketch basic features relevant to this study of unjust enrichment in England, France, Scotland, and, where appropriate, other jurisdictions. Features are relevant if taken formally by each legal system to be part of unjust enrichment,¹ and if they need to be understood in their essentials to engage with the arguments presented in succeeding chapters.

The fourth part of this chapter briefly addresses two specific points about unjust enrichment of further relevance in this study: a distinction between justifications for enrichments and impoverishments (in French law) is rejected; as is the view that, to be effective, a legal ground for an enrichment must confer an entitlement to that enrichment. This should ease engagement with some material addressed in succeeding chapters.

I. ENGLISH LAW

This part mainly addresses English law's general approach to unjust enrichment claims. It also notes the status of unjust enrichment in two other major common law jurisdictions, Australia and Canada, to which reference is also made in this study.

A. Status of unjust enrichment

The Supreme Court appears to have endorsed two main functions for unjust enrichment.² The first is as a viable category which merits recognition by the law.³ It assembles instances of liability. Even if basically distinct, common law categories are

¹ So, for example, cases involving restitution following the termination of contracts in French law are not considered, because addressed elsewhere: *Code civil*, art 1229(3). Consideration of quasi-contract and unjustified enrichment in the French public law of obligations has also been omitted. See further JC Ricci and F Lombard, *Droit administratif des obligations* (1st edn, Sirey 2018) nos 412-475.

² *Barnes v Eastenders Cash & Carry Plc* [2014] UKSC 26, [2015] AC 1 [102] (Lord Toulson, with whom Lady Hale, Lord Kerr, Lord Wilson, and Lord Hughes agreed).

³ *HM Revenue and Customs v Investment Trust Companies* [2017] UKSC 29, [2018] AC 275 [39] (Lord Reed, with whom Lord Neuberger, Lord Mance, Lord Carnwath, and Lord Hodge agreed).

not watertight. They may be debated, untidy, non-exhaustive, and deny history.⁴ Despite their relative weakness, broad, overlapping categories, remain worthwhile in providing stability and guidance by consolidating expectations, and loosely expressing the law's underlying ideals.⁵

In performing this categorising function, unjust enrichment takes on a second: explanation. Cases in the unjust enrichment category are grouped because, in each, a person is left better off than it should be. So, it is said that unjust enrichment is a 'concept [or] unifying principle underlying a number of different types of claim'.⁶ If explained on this basis, rights, duties, powers or liabilities enjoy, *de lege lata*, some basic independence from others. They can often be differentiated, for example, from those arising from contracts,⁷ torts and equitable wrongs,⁸ persisting rights over property,⁹ or special statutory regimes.¹⁰ An accepted framework for analysis of unjust enrichment cases has been formulated as follows:¹¹

'(1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant? [...] [I]f the first three questions are answered affirmatively and the fourth negatively, the claimant will be entitled to restitution [...].'

⁴ S Waddams, *Dimensions of Private Law* (CUP 2003) chs 1, 11.

⁵ H Dagan, 'Doctrinal Categories, Legal Realism, and the Rule of Law' (2015) 163 U Pa L Rev 1889, 1905-1911. On taxonomy in private law, compare, eg, P Birks, 'Introduction' in P Birks (ed), *English Private Law* (1st edn, OUP 2000). For judicial recognition of the value of classification, but cautioning against overly rigid categories, see *Foskett v McKeown* [2001] 1 AC 102 (HL) 129 (Lord Millett, with whom Lord Browne-Wilkinson, and Lord Hoffmann agreed); *Attorney General v Blake* [2001] 1 AC 268 (HL) 284 (Lord Nicholls, with whom Lord Goff, and Lord Browne-Wilkinson agreed), 290 (Lord Steyn).

⁶ *ITC UKSC* (n 3) [40] (Lord Reed, with whom Lord Neuberger, Lord Mance, Lord Carnwath, and Lord Hodge agreed).

⁷ See, eg, *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38, [2015] 1 WLR 2961 [24]-[25] (Lord Mance, with whom Lord Wilson, Lord Sumption, Lord Reed, and Lord Toulson agreed), recognising that a remedy arises either from contract or unjust enrichment.

⁸ *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [10], [24] (Lord Clarke, with whom Lord Kerr, and Lord Wilson agreed); *Novoship (UK) Limited v Nikitin* [2014] EWCA Civ 908, [2015] 1 QB 499 [46], [84], [107] (Longmore LJ, Moore-Bick, and Lewison LJ).

⁹ *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176 [37] (Lord Clarke), [98] (Lord Neuberger), [108] (Lord Carnwath), [141] (Lord Kerr and Lord Wilson, agreeing with Lord Clarke, and Lord Neuberger).

¹⁰ *BTI 2014 LLC v Sequana SA* [2016] EWHC 1686 (Ch), [2017] Bus LR 82 [454]-[455] (Rose J).

¹¹ *Menelaou* (n 9) [18]-[19] (Lord Clarke, with whom Lord Neuberger, Lord Kerr, and Lord Wilson agreed).

De lega lata, the dual functions outlined above give a generalising potential to unjust enrichment, on the foundations of which it is unnecessary to take a firm view here.¹² The courts may recognise new grounds of recovery in appropriate cases.¹³ These will join the unjust enrichment category if their facts disclose that somebody is wealthier than is proper in the eyes of the law, in a way presenting sufficiently close analytical links with established claims.

Unjust enrichment holds a similar taxonomical and explanatory status in Australia.¹⁴ There, it is not ‘a definitive legal principle’,¹⁵ or one ‘which can be taken as a sufficient premise for direct application in a particular case’.¹⁶ Rather, it is a ‘unifying legal concept, which’.¹⁷

‘explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case’.

The position in Canada is again comparable. Unjust enrichment is one category of restitutionary recovery recognised by law.¹⁸ It explains traditional kinds of claim and

¹² One of the most interesting accounts favouring unjust enrichment’s normativity, a controversial issue, is K Barker’s ‘Theorising Unjust Enrichment Law: Being Realist(ic)?’ (2006) 26 OJLS 609, 615ff.

¹³ *Gibb v Maidstone & Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, [2010] IRLR 786 [23]-[27] (Laws LJ, with whom Rimer LJ agreed).

¹⁴ See, perhaps most clearly in the High Court, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89 [150]-[151] (Gleeson CJ, Gummow, Callinan, Heydon, and Crennan JJ); *Equuscorp Pty Ltd v Haxton* [2012] HCA 7, (2012) 246 CLR 498 [29]-[30] (French CJ, Crennan, and Kiefel JJ).

¹⁵ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 378 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ).

¹⁶ *Friend v Brooker* [2009] HCA 21, (2009) 239 CLR 129 [7] (French CJ, Gummow, Hayne, Heydon, and Bell JJ).

¹⁷ *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (HCA) 256-257 (Deane J). Direct approvals: *David Securities* (n 15) 378-379 (Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ); *Lumbers v W Cook Builders Pty Ltd (in liq)* [2008] HCA 27, (2008) 232 CLR 635 [83]-[85] (Gummow, Hayne, Crennan, and Kiefel JJ). Direct and indirect approvals: *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, (2014) 253 CLR 560 [20] (French CJ), [73] (Hayne, Crennan, Kiefel, Bell, and Keane JJ), [105] (Gageler J).

¹⁸ *Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] SCC 1, [2007] 1 SCR 3 [33] (Bastarache J, with whom McLachlin CJ, and Binnie, LeBel, Deschamps, Fish, Abella, Charron, and Rothstein JJ agreed).

permits generalisation in appropriate cases. This was confirmed, for example, in *Peel (Regional Municipality) v Canada*.¹⁹ In 2014, the Supreme Court of Canada set out key statements from *Peel*, and commented that it had ‘further developed the law through application of an *organi[s]ing principle* without displacing the existing specific doctrines’.²⁰

B. Injustice

The first, second and fourth questions in the unjust enrichment enquiry do not arise for detailed discussion.²¹ Background is given here on the third, which does. Part of English law’s approach to unjust enrichment claims is to require that the claimant establish the existence of an unjust factor.²² In *Moses v Macferlan*,²³ what are retrospectively understood as examples of these were given when it was held that an action lies:

‘[F]or money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff’s situation, contrary to laws made for the protection of persons under those circumstances.’

¹⁹ [1992] 3 SCR 762 (SCC) 788-789 (McLachlin J, with whom La Forest, Sopinka, Gonthier, Cory, and Iacobucci JJ agreed). See also *Moore v Sweet* [2018] SCC 52 [35]-[38] (Côté J, with whom Wagner CJ, and Abella, Moldaver, Karakatsanis, Brown, and Martin JJ agreed).

²⁰ *Bhasin v Hrynew* [2014] SCC 71, [2014] 3 SCR 494 [67]-[68] (Cromwell J, with whom McLachlin CJ, and LeBel, Abella, Rothstein, Karakatsanis, and Wagner JJ agreed), emphasis added.

²¹ See further AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart 2012); E Ball, *Enrichment at the Claimant’s Expense: Attribution Rules in Unjust Enrichment* (Hart 2016); E Bant, *The Change of Position Defence* (Hart 2009); A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart 2016).

²² *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 363 (Lord Browne-Wilkinson), 386 (Lord Goff), 395 (Lord Lloyd), 409 (Lord Hope).

²³ (1760) 2 Burr 1005; 97 ER 676 (KB) 1009 (Lord Mansfield).

Over a quarter of a century earlier, in *Attorney General v Perry*,²⁴ the Court of King's Bench held:

'[W]henever a man receives money belonging to another without any reason, authority or consideration, an action lies against the receiver as for money received to the other's use; and this, as well where the money is received through mistake under colour, and upon an apprehension, though a mistaken apprehension of having a good authority to receive it, as where it is received by imposition, fraud or deceit in the receiver [...].'

Several factors are established as grounds for restitution.²⁵ The significance of the latter quotation is the phrase 'without any reason, authority or consideration'. England's approach to the unjust question appears in some way to be mixed. The unjust factors are important. But the law may also ask whether there is a positive reason for the defendant's enrichment. Specifics remain uncertain. In particular, the question arises whether both the unjust factor and justification inquiries can be conducted in the same breath. They may to some extent have to be hived off.²⁶ But the general line of thinking is recognised in its essentials by many commentators.²⁷ And there is good authority for it in principle. So, the Privy Council has accepted that enrichments conferred pursuant to contractual or statutory obligations, or other entitlements, are 'not unjust'.²⁸ English law does not formally think of itself as taking a

²⁴ (1733) Com 481; 92 ER 1169 (KB) 491 (Reynolds CB, and Carter and Fortescue BB).

²⁵ Eg, compulsion, mistake, and duress. See, respectively, *Brook's Wharf & Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 (CA) 545 (Lord Wright MR, with whom Romer LJ, and Macnaghten J agreed); *Jones v Churcher* [2009] EWHC 722 (QB), [2009] 2 Lloyd's Rep 94 [41]-[43] (Judge Havelock-Allan QC); *Kolmar Group AG v Traxpo Enterprises PVT Ltd* [2010] EWHC 113 (Comm), [2011] 1 All ER (Comm) 46 [92]-[96] (Christopher Clarke J).

²⁶ H Scott, 'Defence, Denial or Cause of Action? "Enrichment Owed" and the Absence of a Legal Ground' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart 2016).

²⁷ L Smith, 'Demystifying Juristic Reasons' (2007) 45 Can Bus LJ 281, 291-300, 304; G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) chs 6-7 esp 120-125, 133; J Edelman and E Bant, *Unjust Enrichment* (2nd edn, Hart 2016) ch 7 esp 119-126, 130-134; C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [1-11]-[1-12], [1-28]-[1-29], [2-01], [29-26]-[29-27]. For a more traditional approach not adopting legal grounds, see K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (3rd edn, Lexis Nexis 2016) [166] and, eg, [215]-[216], [233], [703], [909]-[910].

²⁸ *Fairfield Sentry Ltd v Migani* [2014] UKPC 9 (BVI), [2014] 1 CLC 611 [17]-[18] (Lord Sumption, with whom Lord Neuberger, Lord Mance, Lord Clarke, and Lord Toulson agreed), references omitted.

mixed approach. But legal grounds are relevant to unjust enrichment in this jurisdiction.²⁹ This will be elaborated as appropriate throughout this study.

C. No unified theory

It is unnecessary to make any theoretical or philosophical commitments about unjust enrichment in this study.³⁰ But it is necessary to accept its normative diversity. Courts in England and Australia reject ‘any all-embracing theory of restitutionary rights and remedies founded upon a notion of “unjust enrichment”’.³¹ The Supreme Court has said that:³²

‘English law does not have a universal theory to explain all the cases in which restitution is available. It recognises a number of discrete factual situations in which enrichment is treated as vitiated by some unjust factor. These factual situations are not, however, random illustrations of the Court’s indulgence to litigants. They have the common feature that some legal norm or some legally recognised expectation of the claimant falling short of a legal right has been disrupted or disappointed. Leaving aside [public policy] cases of illegality, legal compulsion or necessity, [...] the defendant’s enrichment at the claimant’s expense is unjust because [...] the claimant’s consent to the defendant’s enrichment was impaired, qualified or absent.’

Canada is formally committed to a unified application of its absence of juristic reason approach across contexts – say, of commerce, or the family. The only flexibility

²⁹ See also *DD Growth Premium 2X Fund v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36 (Cay), [2018] Bus LR 1595 [60], [62] (Lord Sumption and Lord Briggs, with whom Lord Carnwath agreed), [66] (Lord Hodge, with whom Lord Mance agreed, dissenting as to the result).

³⁰ Relevant work includes R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009); D Priel, ‘The Justice in Unjust Enrichment’ (2014) 51 *Osgoode Hall LJ* 813; C Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016).

³¹ *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516 [72] (Gummow J); approved in *Barnes* (n 2) [112] (Lord Toulson, with whom Lady Hale, Lord Kerr, Lord Wilson, and Lord Hughes agreed); *AFSL* (n 17) [74] (Hayne, Crennan, Kiefel, Bell, and Keane JJ).

³² *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2018] AC 313 [22] (Lord Sumption, with whom Lord Neuberger, Lord Clarke, and Lord Hodge agreed), reference and internal quotation marks omitted.

technically allowed is in the application of that law to the facts of cases.³³ But both objective (or institutional) and subjective juristic reasons against restitution are built into the law's structure. The former, considered first by courts, include contract and disposition of law.³⁴ The latter, considered next,³⁵ may be formed subjectively: the expectations of parties to a dispute (though these are objectively evaluated according to reasonableness).³⁶ This is before one considers the mixture of objective and subjective analyses internal to each stage of the juristic reason inquiry.³⁷ And it leaves aside the question whether Canadian courts have once and for all adopted an absence of juristic reason approach over one based on unjust factors.³⁸ Even on that level, mixture might persist.³⁹

II. FRENCH LAW

This part addresses the French principle against unjustified enrichment and the place of unjustified enrichment claims under the *action de in rem verso*, or *action en enrichissement injustifié*, as it is now called, following the reform of the *Code civil*, which entered into force on 1 October 2016. Other work covers the detailed history.⁴⁰ However, most of the discourse on subsidiarity to be examined in this study predates the codification of the *action de in rem verso*. So some general information on the law

³³ *Kerr v Baranow* [2011] SCC 10, [2011] 1 SCR 269 [33]-[34] (Cromwell J, with whom McLachlin CJ, and Binnie, LeBel, Abella, Charron, and Rothstein JJ agreed).

³⁴ For simultaneous acceptance of each, see *Jedfro Investments (USA) Ltd v Jacyk* [2007] SCC 55, [2007] 3 SCR 679 [34]-[36] (McLachlin CJ, with whom Bastarache, Binnie, LeBel, Deschamps, Charron, and Rothstein JJ agreed).

³⁵ With public policy: *Moore* (n 19) [83] (Côté J, with whom Wagner CJ, and Abella, Moldaver, Karakatsanis, Brown, and Martin JJ agreed).

³⁶ Applying reasonable expectations, alongside contract, see, eg, *Montor Business Corporation v Goldfinger* [2016] ONCA 406 [116]-[117] (Pepall JA, with whom Cronk, and Lauwers JJA agreed), leave to appeal refused [2016] CanLII 89828 (SCC).

³⁷ See D Sheehan, 'Unjust Factors, Absence of Juristic Reason and the Development of Canadian Unjust(ified) Enrichment Law' (2016) 49 UBC L Rev 619.

³⁸ See especially the mixed messages in *Kerr* (n 33) [31]-[32] (Cromwell J, with whom McLachlin CJ, and Binnie, LeBel, Abella, Charron, and Rothstein JJ agreed). For evidence that even money had and received is alive and well, see *International Longshore & Warehouse Union Local 502 v Ford* [2016] BCCA 226 [23]-[31] (Garson J, with whom Groberman, and Felon JJ agreed).

³⁹ See L Smith, 'The State of the Law of Unjust Enrichment in Common Law Canada' (2015) 57 Can Bus LJ 39.

⁴⁰ See, *inter alia*, J-M Augustin, 'Introduction historique à l'enrichissement sans cause en droit français' in V Mannio and C Ophèle (eds), *L'enrichissement sans cause – la classification des sources des obligations* (LGDJ 2007); CP Filios, *L'enrichissement sans cause en droit privé français* (Bruylant 1999) nos 2-73. See also F Chénéde, 'Charles Toullier, le quasi-contrat' [2011] RDC 305; F Chénéde, 'Joseph-Émile Labbé, l'enrichissement sans cause' [2011] RDC 1005.

prior to this is given. France's *condictio indebiti* and doctrine of *negotiorum gestio* are not considered in detail in this study.

A. Pre-reform

The *Code civil* of 1804 recognised a notion of quasi contract (*quasi-contrat*). Formally, it encompassed France's *condictio indebiti* and doctrine of *negotiorum gestio*. These were provided for by ex articles 1372-1381 of the *Code*. What used to be article 1371 stated:

'Quasi-contracts are purely voluntary acts of man which result in a duty of some kind towards another, and sometimes a reciprocal duty between both parties.'

Originally, then, there was no provision, either for any unjustified enrichment action explicitly so called, still less a general principle against unjustified enrichment. Despite this, early modern French jurists asserted the existence of both.⁴¹

The position of the *Cour de cassation* varied throughout the nineteenth century. It appears to have granted tacitly an *action de in rem verso* on occasion;⁴² explicitly denied any general principle;⁴³ and founded gain-based recovery on an extended, or 'abnormal', *negotiorum gestio*.⁴⁴ But on 15 June 1892, the *Chambre des requêtes* decided the *Boudier* case. The court held:⁴⁵

⁴¹ CBM Toullier, *Droit civil français*, vol XI (4th edn, Warée & Warée 1824) no 112; C Aubry and CF Rau, *Cours de droit civil français, traduit de l'allemand de M CS Zacharie, revu et augmenté, avec l'agrément de l'auteur*, vol IV (1st edn, Lagier 1844) no 576 note 10; repeated after the work assumed a more original form in C Aubry and CF Rau, *Cours de droit civil français: d'après l'ouvrage allemand de C-S Zachariae*, vol V (3rd edn, LDJ 1857) no 576 note 10: 'the *Code Napoléon* contains several provisions which presuppose the acceptance of the principle of *équité* on which the *action de in rem verso* is founded: *nemo cum damno alterius locupletior fieri debet*'.

⁴² Civ, 14 March 1870; [1870] S, I, 291; Civ, 2 December 1891; [1892] D, I, 161, conclusions by A Desjardins AG, noted by L Sarrut; [1892] S, I, 92. An even earlier example is Trib cass, Sect civ, 18 August 1813; *Journal du palais*, vol XI (3rd edn, Patris, 1838) 650, noted by P-A Merlin, applying 'the maxim of natural law, that nobody may enrich himself at another's expense'.

⁴³ Civ 12 March 1850; [1850] S, I, 257.

⁴⁴ Req, 18 June 1872; [1872] DP, I, 471: unjustified enrichment redressed by holding that *gestion d'affaires* arose from the law and the fact of intervention alone, not intention to manage another's affairs. See also Req, 19 December 1877; [1878] S, I, 57; Req, 16 July 1890; [1891] DP, I, 49, noted by M Planiol; [1894] S, I, 19. The latter case declared that even *involuntary* management entitled the intervenor to expenses.

⁴⁵ Req, 15 June 1892; [1892] DP, I, 596; [1893] S, I, 281, noted by J-E Labbé.

‘[T]hat this action [*de in rem verso*], deriving from the principle of *équité* which forbids enrichment at the expense of another and not having been regulated by any legislative provision, [is] not subject to any fixed condition; that it suffices, to render it admissible, that the claimant allege and offer to prove the existence of a benefit which he has, by sacrifice or act, conferred on the person against whom he claims [...]’

In rejecting one of the grounds of appeal, the court further noted approvingly that:

‘[T]he judgment under appeal explicitly declares that the defendants’ right [to restitution] is not based upon [article 548 of the *Code civil*], which is only mentioned [by the court below] as an example and as one of the applications of the principle established tacitly [*consacré virtuellement*] by the Code, that nobody may enrich himself at another’s expense [...]’

This was thought too wide. Following leading commentators,⁴⁶ the *Cour de cassation* soon imposed a further condition that the defendant’s enrichment at the claimant’s expense be without legal basis or legal ground (*sans cause légitime*).⁴⁷ And the action has been entrenched in French law ever since. The same is true of the principle against unjustified enrichment, declared a general principle of law (*principe général du droit*) in a widely commented-upon decision of the *Cour de cassation*’s *Première chambre civile*.⁴⁸

The juridical basis of the *action de in rem verso* was fiercely debated. Candidates included, for example, abnormal *negotiorum gestio*, adopted in academia and by the

⁴⁶ See, eg, the criticisms of Joseph-Émile Labbé in his note on *Boudier*. [1893] S, I, 281, 281, 282 (second column); and the prior suggestion by C Aubry and CF Rau, *Cours de droit civil français d’après la méthode de Zachariae*, vol VI (4th edn, LDJ 1873) no 578(4). In this edition, Aubry and Rau referred explicitly to D 50.17.206, though they invert the final two words of that passage, which was checked against A Watson (ed), *The Digest of Justinian* (UPP 1985).

⁴⁷ For an early case, see Civ, 18 October 1898, [1899] DP, I, 105, noted by LS.

⁴⁸ Although the Court actually used the phrase *s’enrichir injustement* (unjustly), rather than *s’enrichir sans cause* (without legal ground): Civ 1re, 4 April 2001, pourvoi n° 98-13285, *Bull civ* I, n° 105; [2001] Defrénois 721, observations by J-L Aubert; [2001] D 1824, observations by M Billiau; [2002] LPA 2 April n° 66, 9, noted by A Gosselin-Gorand; [2002] JCP G, I, 134, n° 18, observations by A-S Barthez.

Cour de cassation;⁴⁹ straightforward delictual liability;⁵⁰ enrichment as an unlawful act, albeit not delictual;⁵¹ risk-based delictual liability requiring profit plus causation;⁵² delictual liability for damage causing profit;⁵³ the correction of an imbalance between patrimonies, with additional reliance on *équité*;⁵⁴ and a moral rule, deriving from *équité*, custom and *jurisprudence*.⁵⁵ However, many have recognised that they are dealing simply with the receipt of an undue advantage.⁵⁶

Despite this development, the much criticised quasi-contractual category remains.⁵⁷ The *Cour de cassation* has never felt bound to hold that the *action de in rem verso* is quasi-contractual.⁵⁸ And a lone, unreported, decision of the *Première chambre civile* does note that an obligation arising from unjustified enrichment has nothing to do with contract; and that the ‘outdated word “quasi-contract” can cast no doubt upon this’.⁵⁹ But the action was often attached to ex article 1371 of the *Code civil* to provide it with

⁴⁹ F Laurent, *Principes de droit civil français*, vol XX (Bruylant-Christophe 1876) no 333ff; C Demolombe, *Cours de code Napoléon*, vol XXXI (4th edn, Lahure 1882) no 49; and see, eg, Req, 18 June 1872 (n 44); Req, 19 December 1877 (n 44); Req, 16 July 1890 (n 44).

⁵⁰ M Planiol, *Traité élémentaire de droit civil* (1st edn, Cotillon-Pichon 1900) no 976.

⁵¹ M Planiol, ‘Classification des sources des obligations’ (1904) 33 Rev crit lég jur 224, 227-229; M Planiol, *Traité élémentaire de droit civil*, vol II (9th edn, LGDJ 1923) no 937.

⁵² G Ripert and R Teisseire, ‘Essai d’une théorie de l’enrichissement sans cause en droit civil français’ [1904] RTD Civ 727, 754-765.

⁵³ H Loubers, ‘L’action «de in rem verso» et les théories de la responsabilité civile I and II’ (1912) 41 Rev crit lég jur 396, 462.

⁵⁴ Aubry and Rau, *Cours*, 4th edn (n 46) no 578-4; R Demogue, *Les notions fondamentales du droit privé* (Rousseau 1911) 481-487.

⁵⁵ G Ripert, *La règle morale dans les obligations civiles* (4th edn, LGDJ 1949) no 145; L Josserand, *Cours de droit civil positif français*, vol II (3rd edn, Sirey 1939) nos 564-566. See also, advocating an entire category of *enrichissement injuste*, under which are grouped the *condictio indebiti*, *negotiorum gestio*, and the *action de in rem verso*, based on ‘general rule of *équité* that nobody may enrich himself without a right to do so at another’s expense’, Ambroise Colin and Henri Capitant’s *Cours élémentaire de droit civil français*, vol II (7th edn, Dalloz 1932) 217, 223-229. (This was the last edition by them alone.)

⁵⁶ For a full analysis, see E Descheemaeker, ‘Quasi-contrats et enrichissement injustifié en droit français’ [2013] RTD Civ 1. The modern revivor of this idea seems to be Jean Carbonnier. See, eg, his *Théorie des obligations* (PUF 1963) nos 198, 203. But Descheemaeker shows that it goes back much further.

⁵⁷ For critiques of quasi-contract in France, see, notably, Toullier (n 41) nos 15-20; H Vizioz, *La Notion de quasi-contrat, étude historique et critique* (Cadoret 1912) no 55ff esp 75; Descheemaeker (n 56). Compare, eg, Demolombe (n 49) nos 1-447 esp 5-6, 17-21, 25ff, 33-42, 48-49, 51-55, 230-236; M Douchy, *La notion de quasi-contrat en droit positif français* (Economica 1997).

⁵⁸ See, eg, and *ex multis*, Civ, 6 July 1927; [1928] S, I, 19; Civ 1re, 19 January 1988, pourvoi n° 85-17618, *Bull civ I*, n° 16. In the latter case, the court simply cited ‘the principles which govern unjustified enrichment’.

⁵⁹ Civ 1re, 15 December 1976, pourvoi n° 75-12883.

a legislative base.⁶⁰ The abolition of an entire category, approved by the legislator, was perhaps thought impossible.

B. Post-reform

The current French law of unjustified enrichment is found in subtitle III of title III of book III of the *Code civil*, entitled 'Other sources of obligations'.⁶¹ The first provision, article 1300, reads:⁶²

'Quasi-contracts are purely voluntary actions which result in a duty in a person who benefits from them without having a right to do so, and sometimes a duty in the person performing them towards another person. The quasi-contracts governed by this sub-title are management of another's affairs, payment of a debt which is not due, and unjustified enrichment.'

Management of another's affairs and undue payments are governed, respectively, by articles 1301 to 1301-5 and 1302 to 1302-3. Unjustified enrichment is dealt with by articles 1303 to 1303-4. These are so succinct that it is as well to set them out in full:

'1303 – Outwith the situations of management of another's affairs and undue payment, a person who benefits from an unjustified enrichment at the expense of another person must make restitution to the person who is thereby impoverished, of an amount equal to the enrichment or the impoverishment, whichever is the lesser.

⁶⁰ See, eg, in multiple chambers of the *Cour de cassation*: Civ 3e, 1 April 1971, pourvoi n° 69-11939, *Bull civ III*, n° 239; Civ 3e, 5 January 1972, pourvoi n° 70-12910, *Bull civ III*, n° 1; Civ 1re, 22 October 1974, pourvoi n° 73-11612, *Bull civ I*, n° 272; Com, 4 October 1976, pourvoi n° 75-12689, *Bull civ IV*, n° 242.

⁶¹ All codal translations in this study borrow heavily where possible from J Cartwright, B Fauvarque-Cosson and S Whittaker, *The new provisions of the Code civil created by Ordonnance n° 2016-131 of 10 February 2016 and including revisions made to the text by Loi no 2018-287 of 20 April 2018 translated into English* (Ministère de la Justice 2018).

⁶² For criticism, see, eg, JS Borghetti, 'Article 1300: les quasi-contrats' [2015] RDC 792; R Libchaber, 'Le malheur des quasi-contrats' [2016] Dr et patr, n° 258, May, 73, May 2016, 73, 73-74.

1303-1 – An enrichment is unjustified where it stems neither from the fulfilment of an obligation by the person impoverished nor from his intention to confer a gratuitous benefit.

1303-2 – There is no restitution where the impoverishment stems from an act done by the impoverished person with a view to his personal benefit. The court may reduce the quantum of a restitutionary award if the impoverishment stems from the fault of the person impoverished.

1303-3 – The impoverished person has no action on this basis where another action is open to him or is barred by an obstacle of law, such as prescription.

1303-4 – Impoverishment established on the day that it occurred, and enrichment such as it subsists on day of the claim, are valued on the day that the court gives judgment. If the enriched person was in bad faith, restitution is equal to the higher of these two values.'

These provisions will require bold interpretation to provide continuity in French law's approach to unjustified enrichment. In particular, article 1303-1 is too narrowly drafted.⁶³ Given its strident original approach in the unjust enrichment context,⁶⁴ the *Cour de cassation* will likely rise to this challenge.

III. SCOTS LAW

This section addresses the Scottish principle against unjustified enrichment and Scots law's general approach to unjustified enrichment claims.

⁶³ For criticism, see M Mignot, 'Commentaire article par article de l'ordonnance du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations (VII)' [2016] LPA 13 April n° 74, 7.

⁶⁴ And others, eg, the *Blieck* case: Ass plén 29 March 1991, pourvoi n° 89-15231, *Bull ass plén*, n° 1; [1991] D 324, noted by C Larroumet; [1991] RTD Civ 541, observations by P Jourdain; [1991] Defrénois 729, observations by J-L Aubert.

A. Principle

In Scots law, '[t]he precise contours of unjustified enrichment remain to be mapped'.⁶⁵ But the underlying idea is established by the highest authority. Important decisions in the 1990s marked 'the generalisation of the obligation to reverse unjustified enrichment'.⁶⁶ In *Shilliday v Smith*,⁶⁷ Lord Rodger gave the leading opinion, with which Lord Kirkwood and Lord Caplan agreed. It deserves to be quoted at length. His Lordship said:

'[A] person may be said to be unjustly enriched at another's expense when he has obtained a benefit from the other's actings or expenditure, *without there being a legal ground which would justify him in retaining that benefit*. The significance of one person being unjustly enriched at the expense of another is that in general terms it constitutes an event which triggers a right in that other person to have the enrichment reversed. As the law has developed, it has identified various situations where persons are to be regarded as having been unjustly enriched at another's expense and where the other person may accordingly seek to have the enrichment reversed. *The authorities show that some of these situations fall into recognisable groups or categories*. Since these situations correspond, if only somewhat loosely, to situations where remedies were granted in Roman law, in referring to the relevant categories our law tends to use the terminology which is found in the Digest and Code. The terms include *condictio indebiti*; *condictio causa data, causa non secuta* and – to a lesser extent – *condictio sine causa*. [...] [R]epetition, restitution, reduction and recompense are simply examples of remedies which the courts grant to reverse an unjust enrichment, depending on the way in which the particular enrichment has arisen [...].'

⁶⁵ *Biffa Waste Services Ltd v Patersons of Greenoakhill Ltd* [2015] CSOH 137, 2015 GWD 34-548 [29] (Lord Woolman). For modern developments, see M Hogg, 'Unjustified Enrichment in Scots Law Twenty Years On: Where Now?' [2006] RLR 1; HL MacQueen, 'The Future of Unjustified Enrichment in Scotland' [2017] RLR 14.

⁶⁶ *Robertson Construction Central Ltd v Glasgow Metro LLP* [2009] CSOH 71, 2009 GWD 19-304 [18] (Lord Hodge).

⁶⁷ 1998 SC 725 (IH) 727-728 (the Lord President [Rodger]), 732 (Lord Kirkwood), 734 (Lord Caplan) (emphasis added). See also *Morgan Guaranty Trust Co of New York v Lothian RC* 1995 SC 151 (IH); *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90.

This summarises Scots law's principle against unjustified enrichment. One who is enriched at another's expense must restore its enrichment to that other if the enrichment is without legal ground. Remedies follow, *unless* there is a defence in equity,⁶⁸ which it is for the defender to show.⁶⁹

B. Structure

The shape of the Scots law of unjustified enrichment is becoming clearer. An approach similar to English law's was flirted with,⁷⁰ amid strong hints at civilian leanings.⁷¹ The law now is structured along the latter general lines.⁷² There is growing consensus, which currently remains academic,⁷³ that underneath a general enrichment principle, the law is organised according to the manner in which enrichments are received.⁷⁴ Caution is therefore required whilst looking south of the Border for inspiration.⁷⁵ A brief sketch of the legal landscape follows.

First, there is enrichment by what has been called 'deliberate conferral', or 'by transfer':⁷⁶ the intentional causing of money, other property, or the benefit of services,

⁶⁸ On equity in Scots enrichment law, see generally DJ Carr, *Ideas of Equity* (ELET 2017) ch 3. There appears to be a slight trend to treat equity in unjustified enrichment as importing a general discretion to do what seems fair and just on the facts of a case. See, eg, *MacKays Stores Ltd v Toward Ltd* [2008] CSOH 51 [28] (Lord Drummond Young); *Advocate General for Scotland v John Gunn and Sons Ltd* [2018] CSOH 39 [62] (Lord Uist). This cannot be addressed here, except to say that it would be better forgotten. See further M Campbell, 'Equity Flailing? Against Ad Hocery in Unjustified Enrichment' (2018) 22 *Edinburgh L Rev* 393.

⁶⁹ *Morgan Guaranty* (n 67) 166 (the Lord President [Hope], with whom Lord Mayfield and Lord Kirkwood agreed); *Compagnie Commerciale Andre SA v Artibell Shipping Company Ltd (No 2)* 2001 SC 653 (OH) [23] (Lord Macfadyen); *Corrie v Craig* unreported 31 October 2012 (Sh Ct, Kirkcudbright), 2013 GWD 1-55 [16] (Sheriff Brown).

⁷⁰ WJ Stewart, *The Law of Restitution in Scotland* (W Green 1992) ch 3 esp [3.9]-[3.10]; building upon P Birks, 'Six Questions in Search of a Subject – Unjust Enrichment in a Crisis of Identity' [1985] JR 227; P Birks, 'Restitution: A View of the Scots Law' [1985] CLP 57.

⁷¹ Eg N Whitty, 'Some Trends and Issues in Scots Enrichment Law' [1994] JR 127, 132-134.

⁷² *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [153], [155], [158] (Lord Walker).

⁷³ And 'not yet fully reflected in the decisions of the Scottish courts': MacQueen (n 65) 21; R Evans-Jones, *Unjustified Enrichment, II: Enrichment Acquired in Any Other Manner* (W Green 2013) [1.52].

⁷⁴ See, eg, N Whitty and D Visser, 'Unjustified Enrichment' in R Zimmermann, K Reid and D Visser (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (OUP 2004) 411-432; and the leading short account in HL MacQueen and Lord Eassie (eds), *Gloag & Henderson: The Law of Scotland* (14th edn, W Green 2017) ch 24.

⁷⁵ See *Joint Liquidators of Simclar (Ayrshire) Ltd v Simclar Group Ltd* [2011] CSOH 54, 2011 SLT 1131 [31]-[34] (Lord Hodge).

⁷⁶ R Evans-Jones, *Unjustified Enrichment, I: Enrichment by Deliberate Conferral: Condictio* (W Green 2003) [2.15]-[2.17]; M Hogg, *Obligations* (2nd edn, Avizandum 2006) [4.45]. See further J du Plessis,

to pass from one patrimony to another. This category of unjustified enrichment is comprised of sub-types of claim, often designated by Latin tags,⁷⁷ like *condictio indebiti*,⁷⁸ *condictio causa data, causa non secuta*,⁷⁹ *condictio ob causam finitam*,⁸⁰ *condictio ob turpem vel injustam causam*,⁸¹ or *condictio sine causa*.⁸² The last of these permits this category of enrichment claim to welcome novel cases under the general enrichment principle.

Secondly, there is enrichment by imposition. This category of unjustified enrichment can be divided in two. In the first place, there is enrichment by the imposition of benefits on another's property.⁸³ This sub-category of enrichment by imposition does not directly concern us in this study. So we do not further dwell on it here.

'Labels and Meaning: Unjust Factors and Failure of Purpose as Reasons for Reversing Enrichment by Transfer' (2014) 18 Edinburgh L Rev 416, esp 426-430.

⁷⁷ Despite terminology, the claims are not always seen as watertight and constant. See, eg, on the *condictio ob causam finitam*, *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* [2003] ZASCA 64, 2003 (5) SA 193 [15] (Navsa and Heher JJA, with whom Harms, and Farlam JJA, and Shongwe AJA agreed): 'an offshoot of the *condictio sine causa specialis*'. *Griffiths v Janse van Rensburg NO* [2015] ZASCA 158, 2016 (3) SA 389 [22] (Gorven AJA, with whom Shongwe, Pillay, and Saldulker JJA agreed): 'one of the enrichment actions'.

⁷⁸ Transfer on the basis of an obligation which does not exist, in the existence of which there must be a mistaken belief by the pursuer (a liability mistake). Recognised in *Morgan Guaranty* (n 67) 155 (the Lord President [Hope], with whom Lord Mayfield and Lord Kirkwood agreed), 168 (Lord Clyde). Their Lordships also relegated the question whether the pursuer's error is excusable to the status of a factor to be considered if raised by the defender in balancing the equities. See also *Alliance Trust Savings Ltd v Currie* [2016] CSOH 154, 2016 GWD 35-628 [34] (Lord Tyre).

⁷⁹ Transfer on the shared basis of a lawful future state of affairs, outwith contract, which fails to materialise at all. Recognised in *Shilliday* (n 67) 727-729 (the Lord President [Rodger]), 732-733 (Lord Kirkwood), 734 (Lord Caplan). Two points. (1) In the presence of a valid and subsisting contract, the parties' rights and duties are regulated by their agreement; (2) after the termination of a contract, it appears in Scots law that restitution is based upon the mutuality of parties' counter obligations under the agreement: *Stork Technical Services (RBG) Ltd v Ross's Executor* [2015] CSOH 10A, 2015 SLT 160 [34]-[35] (Lord Tyre); M Hogg, 'Restitution Following Termination of Contract: A Contractual or Enrichment Remedy?' (2015) 19 Edinburgh L Rev 269.

⁸⁰ Transfer on the basis of a current state of affairs, which subsequently falls away. Recognised *obiter* in *Thomson v Mooney* [2013] CSIH 115, 2014 Fam LR 15 [11], [13] (Lord Eassie, with whom Lord Bracadale, and Lord Wheatley agreed).

⁸¹ Transfer on the basis of an illegal or immoral purpose. See Stair, *The Institutions of the Law of Scotland* (2nd edn, Anderson 1693) I, 7, 8; AM Bankton, *An Institute of the Laws of Scotland* (Fleming 1751) I, 8, 22; J Erskine, *An Institute of the Law of Scotland* (1st edn, (1773) ELET 2014) III, 1, 10. For old Scots authority, see *Cuthbertson v Lowes* (1870) 8 M 1073 (IH) 1074-1075 (the Lord President [Inglist]).

⁸² Transfer without a legal justifying ground, whether the fact pattern has close links with nominate *condictiones* (eg a *condictio donandi causa* or new variation on the *condictio ob turpem vel injustam causam*) or more abstract analytical links with the general unjustified enrichment principle. Recognised as probably applicable in *Mactaggart & Mickel Ltd v Hunter* [2010] CSOH 130, 2010 GWD 33-683 [99] (Lord Hodge); terminology used in *Shilliday* (n 67) 727 (the Lord President [Rodger]).

⁸³ Evans-Jones, *Enrichment in Any Other Manner* (n 73) ch 5; Hogg, *Obligations* (n 76) [4.69]-[4.71]. The paradigm case is that of the possessor in good faith of land who builds upon it or otherwise improves it (eg by effecting repairs and saving the true owner an expense), who turns out to have no right to the land, such that the true owner is enriched to the value of the possessor's actings.

In the second place, there is enrichment by the imposed discharge of another's monetary or non-monetary obligation.⁸⁴ That is, A either pays B's debt to C; or A performs a service that B is obliged to perform. In both cases, B is saved an expense. This sub-category of unjustified enrichment is inherently open to expansion, since the discharge of an obligation can occur on so many sets of facts.⁸⁵ But this poses no difficulty for our purposes. Though one of the key Scots cases involving the supposed subsidiarity of unjustified enrichment, *Transco Plc v Glasgow City Council*,⁸⁶ was one of enrichment by the performance of another's non-monetary obligation, nothing turns upon this, such that further general elaboration is unnecessary here.

Thirdly, there is enrichment by interference. This category of unjustified enrichment usually deals with the taking, use, consumption, disposal, or acquisition (by operation of law), of another's property.⁸⁷ Behaviour which amounts to the denial of another's property rights is generally unjustified (subject to questions of public utility, for example). Any benefit generated thereby must usually be given up. This category of unjustified enrichment can expand by reference to the unjustified enrichment principle.⁸⁸ For example, patents, a kind of intellectual property, are granted for the sole benefit of their holders. Profits derived from patent infringements may be taken by patent holders.⁸⁹ This might suggest that other rights, such as personality rights,

⁸⁴ Evans-Jones, *Enrichment in Any Other Manner* (n 73) ch 6; Hogg, *Obligations* (n 76) [4.61]-[4.68]. See further S Meier, 'Performance of an Obligation by a Third Party' in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (OUP 2013).

⁸⁵ This is perhaps confirmed by the fact that Evans-Jones, *Enrichment in Any Other Manner* (n 73) ch 6, contains no explicit discussion of analytically similar situations which could expand the field of cases in which unjustified enrichment will operate.

⁸⁶ [2005] CSOH 76, 2005 SLT 958.

⁸⁷ Evans-Jones, *Enrichment in Any Other Manner* (n 73) ch 4; Hogg, *Obligations* (n 76) [4.72]-[4.79]. See further J Blackie and I Farlam, 'Enrichment by Act of the Party Enriched' in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (OUP 2004). For a relevant statement of principle, see *Merchandise Funds Co Ltd v Maxwell* 1978 SLT (Sh Ct) 18, 19 (Sheriff Principal Robert Reid QC): 'There is inherent in the legal idea of ownership, a right on the part of the owner to demand his property from any person into whose hands it may come or to recover the value of the property from any possessor who has sold it knowing that he had not acquired a good title to it from his author.'

⁸⁸ Since this is a developing area, much of the discussion in Evans-Jones, *Enrichment in Any Other Manner* (n 73) ch 4, centres on relaxations of the paradigm criteria of, eg, ownership rights proper, or tangible property.

⁸⁹ Patents Act 1977 (UK) ss 31(2), 61(1)(d). See also the recognition in principle, but failure on the facts, of a claim in unjustified enrichment for disgorgement following a breach of confidence (not in the technical Common Law sense): *Pine Energy Consultants Ltd v Pine Energy (UK) Ltd* [2008] CSOH 10, 2008 GWD 4-60 [30] (Lord Glennie).

should be sanctioned by unjustified enrichment, also.⁹⁰ But these fascinating questions need not further detain us in this study.

C. Development

How the law of unjustified enrichment meets novel cases is important, and will be discussed in a little more detail later in this study. So a primer is given here. The following observations of Lord Hodge in the context of enrichment by transfer are instructive:⁹¹

‘An analysis of the *condictiones* may be useful to ascertain some of the circumstances in which the law will treat enrichment as unjustified. But fundamentally the questions for the court are (i) whether there has been enrichment of A at B’s expense and, if so, (ii) whether A’s retention of that enrichment is justified on some legal ground. [...] [S]ome situations correspond only loosely to the circumstances in which Roman law provided causes of action in the *condictiones*. It appears to me that it would be unnecessarily rigid if our law were to require a precise match with a Roman law cause of action and that the establishment of a unitary principle of unjustified enrichment [...] does not demand such rigidity.’

On this approach, Scots law can move beyond the nominate *condictiones* and paradigm imposition or interference cases.⁹² The gradual, careful relaxation of those categories, which Lord Hodge seems to endorse,⁹³ will keep developments controlled, and hopefully, principled. However, it is not right ‘that one should focus on the principle rather than the categories, either of causes of action or of remedies’.⁹⁴ Rather,

⁹⁰ E Reid, *Personality, Confidentiality and Privacy in Scots Law* (W Green 2010) [16.07]; Hogg, *Obligations* (n 76) [4.79].

⁹¹ *Mactaggart & Mickel* (n 82) [99].

⁹² See generally Evans-Jones, *Condictio* (n 76) [2.08]-[2.10], [6.01]-[6.05]; Evans-Jones, *Enrichment in Any Other Manner* (n 73) [2.14], [2.27], [3.13]-[3.14], [3.32], [3.35], [5.50]-[5.74].

⁹³ And has been accepted can happen in South African law: *Bowman, De Wet & Du Plessis NNO v Fidelity Bank Ltd* 1997 (2) SA 35 (AD) 40 (Harms JA, with whom van Heerden, Eksteen, Nienaber, and Zulman JJA agreed); *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) [28] (Schutz JA, with whom Hefer ACJ, Zulman JA, and Brand, and Nugent AJJA agreed).

⁹⁴ *Corrie* (n 69) [20] (Sheriff Brown).

development centres on a balance.⁹⁵ There is the general principle against unjustified enrichment and the desirability (or not) of applying it to a new case. There is how the new case fits analytically alongside the *condictiones* and already emerged modern solutions. And there is the important point that it is not essential to the recognition of a new case that a similar one have been decided.⁹⁶

IV. TWO SPECIFIC POINTS

For clarity and convenience, this part of the chapter outlines the position taken in this study on two issues in enrichment law.

A. An enrichment-impooverishment distinction in France?

It is submitted that no useful work is done in French law by a distinction between justifications for enrichments and impoverishments, or any requirement that both be unjustified. Such matters also go unheeded by the legislator and the courts. This study should be free from the outset of potential objections to broad arguments about legal grounds for enrichments.

Articles 1303-1 and 1303-2 of the *Code civil* partially separate justifications for *enrichments*, and justifications for *impoverishments*. But the *Code civil*'s distinction is not clean.⁹⁷ Otherwise, intention to confer a gratuitous benefit would more logically be a justification for impoverishments, and belong in article 1303-2. The *Cour de cassation* does not consistently impose the distinction, either. Several cases hold

⁹⁵ R Evans-Jones, 'Thinking About Some Scots Law: Lord Rodger and Unjustified Enrichment' in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (OUP 2013) 444-445.

⁹⁶ South African authority endorses this approach: *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (AD) 332-333 (Botha JA, with whom Kumleben, Grosskopf, and Nienaber JJA, and Kannemeyer AJA agreed).

⁹⁷ For criticism, see F Chénédé, *Le nouveau droit des obligations et des contrats* (2nd edn, Dalloz 2018) [134.22]-[134.24], accepting nevertheless the possibility of the requirement denied here.

against the need for an impoverishment, as against an enrichment, to be unjustified.⁹⁸ And noted French authors are content simply to differ on the matter.⁹⁹

B. No entitlement requirement

It is not necessary for a particular legal mechanism to confer a right to an enrichment in order for it to constitute a good justification for that enrichment. The real question is whether letting a given defendant keep an enrichment is in conformity with the law. Common law cases,¹⁰⁰ and some writers,¹⁰¹ are against the necessity of a right or entitlement. So are the Scots cases,¹⁰² and several leading writers from mixed legal systems.¹⁰³ The *Code civil* is of no help. If its provisions were exhaustive, there would be no way to deny unjustified enrichment actions in many established cases. Some French cases are against us.¹⁰⁴ But others may be read in favour of the position taken

⁹⁸ The clearest case was one in which the *Cour de cassation* allowed an unjustified enrichment action against relatives of the deceased user of a care home and noted specifically that the contract between the deceased and the home justified the home's impoverishment vis-à-vis the deceased but not the enrichment of the family members obliged to step into the deceased's shoes as debtor: Civ 1re, 25 February 2003, pourvoi n° 00-18572, *Bull civ I*, n° 55; [2003] RTD Civ 297, observations by J Mestre and B Fages; [2003] JCP G, II, 10124, noted by P Lipinski; [2004] D 1766, noted by M-P Peis. See also Civ 1re, 14 January 2003, pourvoi n° 01-01304, *Bull civ I*, n° 142; [2003] Defrénois 259, noted by J-L Aubert; [2003] RTD Civ 297, observations by J Mestre and B Fages; Civ 1re, 24 October 2006, pourvoi n° 05-18023, *Bull civ I*, n° 439, suggesting that donative intent, if proved, justifies enrichments, not impoverishments; Civ 1re, 12 January 2011, pourvoi n° 09-71572. Compare, eg, Civ 3e, 31 January 1969, *Bull civ III*, n° 98. Language has long been mixed in lower courts. See, eg, Cour de Bordeaux, 30 May 1929; [1929] DP, II, 151, 157 (eighth case).

⁹⁹ J Carbonnier, *Droit civil*, vol II (final def edn, PUF 2004) no 1228(a): justifications for enrichments include gratuitous intent and self-interest but separate from fault; F Chabas (ed), *Leçons de droit civil de H, L et J Mazeaud*, vol II/1 (9th edn, Montchrestien 1998) nos 700-705: justifications for enrichments separate from sui generis conditions of fault and self-interest; P Esmein, *Traité pratique de droit civil français par Marcel Planiol and Georges Ripert*, vol VII (P Esmein, J Radouant and G Gabolde eds, 2nd edn, LGDJ 1954) no 760: intention to confer gratuitous benefit and acts in self-interest constitute justifications for enrichments.

¹⁰⁰ *Re Beppler & Jacobson Ltd* [2018] EWCA Civ 763 [63] (Gloster LJ, with whom Singh LJ, and Sir Jack Beatson agreed); *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7 (Gue) [144]-[151] (Lord Hodge, with whom Lord Sumption, and Lord Carnwath agreed), [194] (Lord Mance, dissenting on other grounds), [237] (Lord Briggs, dissenting on other grounds). In both these cases, contracts were *silent* about rights to payment: they conferred no relevant rights at all; their construction impliedly excluded unjust enrichment. The shared, non-entitling state of affairs in contemplation of which a benefit is transferred, can also justify a person's enrichment: *Rotam Agrochemical Company Ltd v GAT Microencapsulation GmbH* [2018] EWHC 2765 (Comm) [194]-[195] (Butcher J).

¹⁰¹ Edelman and Bant (n 27) 166-167; Smith (n 27) 291-300.

¹⁰² Previous uncertainty was resolved in Scotland by *Thomson* (n 80) [7]-[10] (Lord Eassie, with whom Lord Bracadale and Lord Wheatley agreed).

¹⁰³ Evans-Jones, *Enrichment in Any Other Manner* (n 73) [3.18]; D Visser, *Unjustified Enrichment* (Juta 2008) 174-175; J du Plessis, *The South African Law of Unjustified Enrichment* (Juta 2012) 56.

¹⁰⁴ See, eg, decisions designating contracts as a mode of acquiring rights justifying enrichments: Civ 3e, 16 March 1977, pourvoi n° 75-13840, *Bull civ III*, n° 130; Civ 3e, 26 November 1979, pourvoi n° 78-12225, *Bull civ III*, n° 207. Of course, it does not necessarily follow that these cases mean that there is what is here called an 'entitlement requirement', but they seem to be what favour it most.

here.¹⁰⁵ An entitlement requirement is also incompatible with several academic accounts.¹⁰⁶ Some, however, disagree with the view put forward. So to anticipate its elaboration in later chapters, general support is offered here, in the context of unjust enrichment and statute.

Sometimes, as will be seen in chapter 4, legislative provisions do not confer rights to enrichments. They simply exclude or modify unjust enrichment claims. Some commentators analyse these situations separately from rules that grant rights to enrichments. They say that such provisions speak to the idea that unjust enrichment cannot circumvent rules of positive law. Otherwise, there would be a fraud on the law – *une fraude à la loi*.¹⁰⁷ If unpacked, this argument disappoints. The disturbance of existing legal institutions is the problem. No unjustified enrichment actions contrary to law is the solution. But the reason why is absent. Does the law say: ‘yes, the defendant’s enrichment is unjustified, but that does not matter and there is no claim’? Does the law say: ‘it does not matter whether the defendant’s enrichment is unjustified or not and there is no claim’? It is submitted that there is a better view. The law says: ‘the defendant’s enrichment is not unjustified, because the relevant rules impliedly approve it’. It is not enough to say, without more, that an unjustified enrichment claim would make a mockery of a given legislative scheme: ‘the defendant’s enrichment is unjustified but the claimant’s claim is against the law’. A better reply is owed to the claimant, who says: ‘but I still think the defendant’s enrichment is unjustified’. The reply is: ‘no, it is not; carefully read, the law says so’. It is difficult to disagree with Professor René Demogue: the entitlement requirement is ‘a useless abstraction, which hardly clarifies matters’.¹⁰⁸

¹⁰⁵ As where the operation of a matrimonial property regime, ‘one of the lawful modes of acquiring rights’, simply ‘excluded’ unjustified enrichment: Civ 1re, 10 May 1984, pourvoi n° 83-12370, *Bull civ I*, n° 153. Or where the will of the party impoverished was (correctly) included in a list of potential justifying grounds: CA Aix-en-Provence, 9 October 2018, RG n° 17/03699.

¹⁰⁶ P Roubier, ‘La position française en matière d’enrichissement sans cause’, *L’enrichissement sans cause – La représentation dans les actes juridiques, Travaux de l’Association Henri Capitant, IV: Journées néerlandaises* (Daloz 1949) 49-54 esp 50 *in fine*, 52 *in fine*; J Chevallier, ‘Observations sur la répétition des enrichissements non causés’, *Le droit privé français au milieu du XXe siècle[:] études offertes à Georges Ripert*, vol II (LGDJ 1950) 242, 245 *in fine*; G Marty and P Raynaud, *Droit civil: Les obligations*, vol I (2nd edn, Sirey 1988) nos 396 *in medio*, 397 *in fine*; B Starck, H Roland and L Boyer, *Droit civil: Les obligations*, vol II (6th edn, Litec 1998) no 2198; Carbonnier (n 99) no 1228(a).

¹⁰⁷ Josserand (n 55) nos 572-573, 574 bis; Esmein (n 99) nos 756(1), 761-762.

¹⁰⁸ *Traité des obligations en général*, vol III (LNDJ 1923) nos 163-164.

CONCLUSION

This chapter has briefly surveyed essential features relevant to this study of unjust enrichment, principally in England, France and Scotland. It has also addressed two points of detail to provide clarity in later chapters. We can now consider subsidiarity, in chapter 2, before examining subsidiarity in unjust enrichment, in chapter 3.

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CHAPTER 2

SUBSIDIARITY

This chapter addresses subsidiarity. As mentioned briefly in the Introduction to this study, the language of subsidiarity is often invoked in unjust enrichment law and scholarship to explain unjust enrichment's relations with other areas of law, or legal regimes. The history of this practice and the reasons for it are addressed in chapter 3. For now, subsidiarity is analysed outwith the unjust enrichment context.

Subsidiarity's linguistic and conceptual roots are centuries old. The historical and theoretical literature is large.¹ Views reasonably differ on subsidiarity's contours and application.² An exhaustive account is not possible here. This chapter aims more modestly to formulate part of subsidiarity's irreducible core: what are some of its undeniable elements which must be respected before anything can be called, or be, a relationship or rule of subsidiarity?

To answer this question, this chapter proceeds in two parts. First, a linguistic perspective is adopted. Dictionary definitions of the noun *subsidiarity* and the adjective *subsidiary* in Latin, English, and French are set out. From them are extracted points about the correct usage of subsidiarity. These are used as a framework in the second part of this chapter, which examines subsidiarity in three contexts – Roman Catholic social doctrine, European Union law, European human rights law – and draws on other material, including writing on subsidiarity in French private law. The conclusion of this chapter draws the threads together by setting out six principles to be respected by users of subsidiarity. These principles will be applied to the law and scholarship on the subsidiarity of unjust enrichment in later chapters.

¹ See, *inter alia*, C Delsol, *L'État subsidiaire* ((1992) repr, Cerf 2015); K Endo, 'The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors' (1994) 44 *Hokkaido L Rev* 652; J Barroche, *État, libéralisme et christianisme: critique de la subsidiarité européenne* (Daloz 2012); N Aroney, 'Subsidiarity in the Writings of Aristotle and Aquinas' in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer 2014).

² For one survey among others, see A Føllesdal, 'Competing Conceptions of Subsidiarity' in JE Fleming and JT Levy (eds), *Federalism and Subsidiarity* (NYUP 2014).

I. LINGUISTIC PERSPECTIVE

This first section sets out a linguistic analysis of subsidiarity in Latin, English and French. The value of such a perspective is briefly explained before proceeding. Words do not bear the same meaning whenever they appear. Walter Wheeler Cook colourfully cautioned that the contrary assumption ‘has all the tenacity of original sin and must constantly be guarded against’.³ However, words do have ordinary meanings. These are usually the starting points for the development of legal concepts, and there are limits to the meaning which language may bear.⁴ It is submitted that dictionaries may inform as to these limits. The law sometimes accepts this, as in the context of contractual interpretation, for instance. In each main legal system under consideration in this study, words used in contracts may have ordinary meanings, even if they are context dependent.⁵ Courts may use dictionaries as a starting point in their search for the meaning of words in context.⁶ ‘[E]ven if they do not speak with one voice’, they are valuable because they ‘may offer a reasonably authoritative source for describing the range of meanings of a word, [...] recognise that usage varies from time to time and place to place’, and can ‘illustrate usage in context’.⁷ It is submitted that

³ WW Cook, “Substance” and “Procedure” in the Conflict of Laws’ (1933) 42 Yale LJ 333, 337.

⁴ F GénY, *Science et technique en droit privé positif*, vol III (Sirey 1921) 460-461; AWB Simpson, ‘The Analysis of Legal Concepts’ (1964) 80 LQR 535, 545-548, 554-555. For demonstration of, and agreement with, the former point in this sentence, see, respectively, SFC Milsom, ‘Reason in the Development of the Common Law’ (1965) 81 LQR 498, 501-504; D Ibbetson, ‘Milsom’s Legal History’ [2017] CLJ 360, 369: ‘[S]o long as we are careful, the Milsomian insight that words originally had their normal general meanings is very valuable. I suspect that it is something that we all tend to assume in our own work today.’ A word may draw all of its meaning from legal discourse itself: G Cornu, *Linguistique juridique* (3rd edn, LGDJ 2005) 62-68. But this is not the case here.

⁵ *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 [14]-[23] esp [15](i), [19], [20] (Lord Neuberger, with whom Lord Sumption and Lord Hughes agreed), [76]-[77] (Lord Hodge), [109], [144] (Lord Carnwath, dissenting as to the result). In French law, *in claris interpretatio non fit*: *Code civil*, art 1192; Civ, 15 April 1872; [1872] S, I, 232; Civ, 12 January 1938; [1938] DH 197. The Scots position is the same as England’s: *AWG Business Centres Ltd v Regus Caledonia Ltd* [2017] CSIH 22 [19] (Lord Carloway, with whom Lord Bracadale and Lord Glennie agreed).

⁶ *Heronslea (Mill Hill) Ltd v Kwik-Fit Properties Ltd* [2009] EWHC 295 (QB) [17]-[19], [26] (Sharp J). For use of a dictionary in the Supreme Court, see *Farstad Supply AS v Enviroco Ltd* [2010] UKSC 18, [2010] Bus LR 1087 [26]-[29] (Lord Clarke, with whom Lord Phillips, Lord Hope, Lord Rodger and Lord Mance agreed). French Courts use dictionaries to assess ambiguity, absent which interpretation is forbidden: Civ 2e, 9 June 2016, pourvoi n° 15-20106; CA Lyon, 10 May 2011, RG n° 09/07919. The Scots position is the same as England’s: *Autolink Concessionaires (M6) Plc v Amey Construction Ltd* [2009] CSIH 14, [2009] BLR 411 [29]-[31] (Lord Kingarth, Lord Eassie and Lord Menzies).

⁷ *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498 (NSWCA) [28] (Mason P, with whom Stein and Giles JJA agreed). This was a statutory interpretation case. For similar remarks in the contractual interpretation context, see *Mills v Cannon Brewery Co Ltd* [1920] 2 Ch 38 (Ch) 44-45 esp 44 (PO Lawrence J): ‘One of the main objects of every dictionary [...] is to give an adequate and comprehensive definition of every word contained in it, which involves setting forth all the different meanings which can properly be given to the particular word.’

from them, essential extra-contextual elements of a definition may be generalised, which set the boundaries of usage. On this basis, and without attempting a historical etymological (or similar) analysis,⁸ the worth of dictionaries and a linguistic perspective is endorsed here.

A. Latin

The following bare definitions of the word *subsidiū* (variously declined) are given by the *Oxford Latin Dictionary*:⁹

- ‘1. A body of troops withheld [sic] from action as a reinforcement for the front line or [similarly], the reserves [...]; b. additional manpower available as a replacement, reserves [...]; a supply kept in reserve [...]
2. Supporting or relieving forces, reinforcements [...]; b. reinforcement, support [...]; c. the action of reinforcing [...]
3. Assistance, help, support [...]
4. A person or thing affording help, a resource, aid, safeguard, etc [...]; b. a means of assistance, help [...]
5. A place providing shelter, haven, refuge.’

The same publication gives the following definitions of the adjectival form, *subsidiārius*:¹⁰

- ‘1. (of troops, etc) Acting as a support for the front line; (m pl as noun) the reserves [...]; b. (of a line of battle) occupied by the reserves. [...] c [...] kept in reserve.
[...]

⁸ For a much more detailed linguistic perspective, see, eg, A Joyeux, ‘Le principe de subsidiarité, entre terminologie et discours: pistes pour une nouvelle histoire de la formule’ (PhD Thesis (in two vols), Franche-Comté, 2016).

⁹ PGW Glare (ed), *The Oxford Latin Dictionary* (2nd edn, OUP 2012) 2038-2039 (original emphasis). See also DP Simpson, *Cassell’s Latin Dictionary* (5th edn, (1968) repr, Cassell 1984) 578.

¹⁰ Glare (n 9) 2038 (original emphasis). See also Simpson (n 9) 578.

2. *actio* ~a, An action enabling a ward to claim compensation from a magistrate who appointed an unsuitable guardian [...] *dig* 27.8.1 [...] 27.8.1.4.'

The first point of interest is about the different entities or groups referred to. They are all assumed to exist: the potential replacer and the not yet replaced; the reinforcer and the reinforced; the safeguard and the safeguarded. There is no suggestion inherent in the mere description of something as a subsidiary entity that it might not exist before, when, or after it is subsidiary. Furthermore, if the non-subsidiary entity were at some point no longer to exist, it could not receive *subsidium*. It seems imprecise, even meaningless, to describe an entity as subsidiary to something which does not exist. Suppose, for example, all of the front line troops in an army are dead. Only the reserves are left. The latter might still be called 'the reserves', but only because that is what they are according to the abstract order of battle. *In concreto*, they are no longer reserves at all. They are the entire army, which is no longer composed of two groups – front liners and reservists – but one.

A second point of interest is that, in the above definitions, we are almost constantly in the presence of clear pluralities: the reserves and the front-liners; the assistant and the assisted; the shelter and the sheltered. But the last usage set out above is not so simply analysed: an action which lay *only* when another, against an errant tutor,¹¹ did not.¹² The actions cannot co-exist, other than in the abstract – in the system of the

¹¹ See D 28.3. The version relied on is A Watson (ed), *The Digest of Justinian* (UPP 1985).

¹² D (n 11) 27.8.1, 27.8.1.12 (emphasis added): 'In ordinem *subsidiaria actio* non dabitur, sed in magistratus, ned in fideiussorus eorum: hi enim rem publicam saluam fore promittunt, non pupilli.' > 'An additional action is given against magistrates but not against the whole board nor against their guarantors; for these have promised to insure state property not that of the pupillus.' After cases in which guarantors were and were not obtained for tutors, it is said: 'Sed et si satis non exegit, idoneus tamen tutor eo tempore fuit, quo tutelae agi potest, sufficit.' > 'But although security was not provided, if the tutor proves sound, when the action on tutelage can be brought, it is enough.'

Digest, or indeed, the Codex,¹³ or Justinian's Institutes.¹⁴ Once one allows oneself to think about the law as applied to a set of *real life facts*, there is *never* the potential for more than one of these actions to lie. It is not possible for something to be subsidiary to another thing if one or the other thing does not exist. So on this point, the use of subsidiarity here appears inapt.

A third point of interest is that the different entities or groups of entities referred to above are all assumed to be capable of doing the same thing on at least some level. 'The same thing' must be understood broadly. The term *overlap* is perhaps better. For example, soldiers can have any number of duties. Narrowly, two or more groups of soldiers can engage the enemy. But groups of troops might do different things in pursuit of a wider objective. One group assists the other, by building a bridge, say, yet with one goal in mind, perhaps the arrival of the other group at a given location. On this wider understanding, there is overlap in what the groups of soldiers are doing. The other definitions help to make the point. To take those referring to help and support, one does not seek assistance with something in the form of an action inapt to aid the resolution of a problem. And something which does not do this is not help or support.

A fourth point of interest relates to the standing of subsidiary and non-subsidiary entities in relation to each other. It appears that if these entities are capable of independent action, then there may exist a reason, unconnected with those entities, which mandates one's subsidiarity to another. Units of troops are capable of movement or other action under their own steam and according to the orders of their respective commanders. But the subsidiarity of one group to another is dictated by some authority higher than each of the groups themselves – perhaps a standing order,

¹³ See C 5.59.5 (with editorial note by FH Blume). The version relied on is T Kearly (ed), *Annotated Justinian Code* (FH Blume tr, 2nd edn, George William Hopper Law Library 2009) <<http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/>>. Under reference to D 27.8, C 5.75.1, C 5.33.1 and a headnote to C 5.42, Blume opines that the 'subsidiary action' referred to in the passage of the Codex cited here was the same as that in D 27.8. A more recent edition has also been consulted, but it omits Blume's note: BW Frier (ed), *The Codex of Justinian[:] A New Annotated Translation, with Parallel Latin and Greek Text [–] Based on a Translation by Justice Fred H Blume*, vol II (CUP 2016). On the economical approach to annotation in this version, see BW Frier, 'Revising Justice Blume's Translation of Justinian's Codex' in BW Frier (ed), *The Codex of Justinian[:] A New Annotated Translation, with Parallel Latin and Greek Text [–] Based on a Translation by Justice Fred H Blume*, vol I (CUP 2016) lxxxvi-xci.

¹⁴ Inst 1.24. The version relied on is P Birks and G McLeod (eds), *Justinian's Institutes* (Duckworth 1987).

or other rule. So, in Roman warfare, overall control of reserve troops did not fall to the commander of the reserve units themselves. Nor did it fall to an officer in the front line. It fell to another officer (let us assume a general), who commanded both the front line units and reserves.¹⁵ Another example is wholly speculative, because it is impossible to know what a Roman lawyer, for whom categorisation was likely not particularly important,¹⁶ would have thought of a rule that organised the relationship between two actions. But let us ask: is such a rule part of one of those actions, or does it stand separately? If the latter, then we are in the presence of a meta-rule.¹⁷ And it might be said that but for that meta-rule, which states that the action against the blameworthy magistrate applies only where the action against the errant tutor does not,¹⁸ then those actions might avail the pupil, or the pupil's heirs,¹⁹ at random. They have their own conditions and could each simply attach or not to a given set of facts if nothing – no *meta-rule* – prevented it.

A fifth point of interest might follow from the fourth. If in a relationship of subsidiarity, entities which are free and capable (as this is understood in the preceding paragraph) appear not to regulate that relationship directly *by themselves*. What *does* regulate their relationship is on a different footing from that on which they themselves sit. One entity may not dominate the other, because there are conditions on which it will receive *subsidium*. Yet the other entity, though not directly subservient to the first, may be unable to decide alone whether it renders *subsidium* or not. Return to our reserve and front line troops. They have no choice as to their deployment. The general, or other overall commander, decides that. If a relationship of subsidiarity between free and capable entities is described precisely, it appears that, in relation to the exercise of

¹⁵ AK Goldsworthy, *The Roman Army at War: 100 BC – AD 200* (OUP 1996) 161; J Thorne, 'Battle, Tactics, and the Emergence of the Limites in the West' in P Erdkamp (ed), *A Companion to the Roman Army* (Blackwell 2007) 224; P Rance, 'Battle' in P Sabin, H van Wees and M Whitby (eds), *The Cambridge History of Greek and Roman Warfare, II: Rome from the Late Republic to the Late Empire* (CUP 2007) 364-365.

¹⁶ PG Stein, 'The Quest for a Systematic Civil Law' (1996) 90 Proc Brit Acad 147, 153. See also WW Buckland and AD McNair, *Roman Law and Common Law* (FH Lawson ed, 2nd edn, CUP 1952) 21: Roman law was not 'a coherent intellectual system'.

¹⁷ For the 'meta' terminology, see, eg, D Burbidge, 'The Inherently Political Nature of Subsidiarity' (2017) 62 Am J Juris 143, passim, eg, 162: 'the principle of subsidiarity is on the one hand used to explain how perceived lower groups should not have their decision-making authority usurped unnecessarily and, on the other hand, is used as a meta-explanation for how authority is distributed within a constitutional order'.

¹⁸ D (n 11) 27.8.1.12. The detached, 'meta-nature' of the rule can also be read into Inst (n 14) 1.24.2.

¹⁹ D (n 11) 27.3.1.17, 27.8.1.4.

their functions, *no entity is sovereign over another*. Yet, recalling our fourth point of interest, neither entity is totally at liberty to do what it would do if unrestrained, either.

A sixth point of interest also arises. In each of the definitions given above, it is clear that the subsidiary entity does not overlap randomly with the non-subsidiary entity, if it overlaps at all. The helper does not help until sent to do so. The reserves – specifically said to be held back initially – do not fight until sent in. The subsidiary action is only allowed when the non-subsidiary action is ineffective. It appears that subsidiarity controls, or prevents, an overlap that might otherwise exist.

B. English

According to the *Oxford English Dictionary Online*, the noun *subsidiarity* reached the English language after French welcomed *subsidiarité*, and German *Subsidiarität*, and is defined as follows:²⁰

‘The quality of being subsidiary; *spec* the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level.’

There is one special point of interest in this definition. It appears to include something – here, a principle – with the ability to cause and maintain the subsidiarity of, say, *x* to *y*, standing separately from both. This independent cause must be capable, then, of conferring a particular status on both *x* and *y*, and conditioning the former’s service to the latter. One sees here an echo of the fourth point of interest about the definitions of *subsidium* and *subsidiarius*: meta-authority.

Upon inspection, the other points of interest appear to be present. The subsidiarity of *x* implies nothing about whether it, or *y*, *should* exist, only that they *do*. The point about pluralities is manifest. The point about overlap appears clearly, as do those about the prevention of that overlap through subsidiarity, and that management of the

²⁰ ‘Subsidiarity, N.’ <<http://www.oed.com/view/Entry/193007>> accessed 23 January 2016 (original emphasis). The entry also observes: ‘[o]riginally a principle in the RC [Roman Catholic] Church, subsidiarity has been an executive principle of the European Union since the Maastricht Treaty of 1992’.

relationship between the subsidiary and non-subsidiary things does not take place via the sovereignty of one entity over another.

Further investigation is now necessary of the *OED*'s general definitions of the adjective *subsidiary*, deriving from the latin *subsidium* and its adjectival form *subsidiārius*:²¹

- '1. a. That provides assistance; supplementary. (a) Without construction. Chiefly of a thing: that serves to help, assist, or supplement; providing assistance or supplementary supplies; (also) auxiliary, tributary, supplementary. (b) With to.
- b. Of a river, stream, or other effluence: tributary. Similarly of a valley, etc.
- c. [Mathematics]. Of an angle, symbol, quantity, etc: introduced into a problem solely in order to aid its solution.
- 2. Subordinate, secondary.
- 3. a. Consisting of a subsidy or subsidies. b. Maintained or retained by subsidies.'

These definitions tend to confirm the findings made thus far. First, to say that something is subsidiary is to assume that it, and the thing to which it is subsidiary, both exist. Nothing can be subsidiary to something which is not there. Something which is not there cannot be subsidiary. This implies, secondly, that a plurality of entities must exist, so that one or more things might be subsidiary to one or more others. Thirdly: overlap. Let us notice again the breadth of this idea: helping someone or something with the same problem; water flowing in the same direction, eventually mixing in the same main channel.

Fourthly comes meta-authority. So clearly appearing from the English noun *subsidiarity*, meta-authority might seem more difficult to tease from the adjective. But it is present. In the first place, nothing here implies that a subsidiary entity is secondary to the non-subsidiary entity *because of the authority* of the non-subsidiary entity. The

²¹ 'Subsidiary, Adj. and N.' <<http://www.oed.com/view/Entry/193008#eid20101240>> accessed 23 January 2016.

main channel of water does not subordinate tributaries to itself. What tributaries are is partly a matter of raw fact and partly a human construction – of geographers and the like – who have interpreted the facts. The same goes for the example given from mathematics. These specific examples help us to appreciate that the general definitions about assistance and supplement are not referring to such actions as *mandated* by a non-subsidiary entity. And in the second place, if it were the subsidiary entity which forced its assistance or supplement upon the non-subsidiary entity, then it would seem inaccurate to describe it as subsidiary, which still means ‘secondary or subordinate’, as we are told. Given these two points, if neither the subsidiary nor non-subsidiary entity controls their total relations, something else must be in the equation which does this. And this, it is submitted, must be a meta-authority.

Fifthly, the lack of one entity’s sovereignty over another when each stands in a relationship of subsidiarity follows from the presence of meta-authority. And sixthly, the order provided by the latter prevents overlap, or at least analyses it away, as in the case of tributary water channels.

C. French

The *Trésor de la langue française informatisé* is the online version of a sixteen volume French dictionary, originally published between 1971 and 1994.²² It gives the following definitions for the French noun *subsidiarité*, the adjective *subsidaire*, and the adverb *subsidiairement*:²³

Subsidiarité. ‘Caractère de ce qui est subsidiaire.’

Subsidiaire. ‘A. Qui vient à l’appui d’une chose plus importante, qui constitue un élément accessoire. Synon[yme] *secondaire*; anton[ymes] *essentiel*, *principal*. [...] B. Destiné à suppléer ce qui viendrait à faire défaut.’

²² See generally G Gorcy, ‘Le Trésor de la langue française (TLF), trente ans après; bilan et perspectives’ (1992) 82 *Études de Linguistique Appliquée* 75.

²³ *Trésor de la langue française informatisé* <<http://atilf.atilf.fr>> (original emphasis). It is not possible to link to specific entries. A search must be conducted from the home page of the website.

Subsidairement. 'De manière subsidiaire, accessoire; venant en second lieu. Anton[ymes] *essentiellement, principalement.*'

These are translated as follows.

Subsidiarity. The quality of that which is subsidiary.

Subsidiary. A. That which comes to support a more important thing, that which constitutes an accessory [or ancillary] element. Synon[ym] *secondary*; anton[yms] *essential, principal* [or *main*]. [...] B. Intended to make up for that which might fail.

Subsidiarily. In a subsidiary, accessory [or ancillary] way [or manner]; coming secondly [or in second place]. Anton[yms] *essentially, principally* [or *mainly*].

Here, the entities supposedly in a relationship of subsidiarity are assumed to exist – the more and less important things, for example. It is also true that just because something might fail does not mean that it disappears before it is made up for.

Secondly, the question of a plurality of entities is also answered by the reference to more and less important things. But one can also point out that, logically, something can only be accessory to *something else*. If that latter something else does not exist, then that former something is not accessory at all.

Thirdly, as to overlap in the role or abilities of entities in a relationship of subsidiarity, something can only make up for something else that fails if it can do what that something else might fail to do. We also see overlap in functions in the phrase '*support* a more important thing' (emphasis added).

Fourthly, and again, meta-authority is more difficult to discern. But it appears to follow from what is absent. There is no trace of thinking in terms of the non-subsidiary entity's *authority* over the subsidiary one, which is nevertheless ancillary or secondary. Nor is

it hinted that the subsidiary entity forces itself on the entity which is aided or supported. If the entities themselves do not manage their own relations, something else must, with the power to do this: meta-authority.

Fifthly, there can be no relationship of straightforward sovereignty between two entities which are governed by meta-authority.

And sixthly, the latter provides order and prevents unrestrained overlap which would be inimical to a relationship of subsidiarity.

The following definitions for the same words are given by a leading French legal dictionary, Gérard Cornu's *Vocabulaire juridique*, now compiled by the Association Henri Capitant:²⁴

Subsidiarité. '1. Caractère de ce qui est subsidiaire. Ex. Subsidiarité de l'action *de in rem verso*. 2 (eur.). Caractère imprimé à l'un des modes d'action de la Communauté européenne. – (**principe de**). Règle directive en vertu de laquelle la Communauté n'agit – en dehors des domaines de sa compétence exclusive – que si et dans la mesure où les objectifs de l'action envisagée ne peuvent être réalisés de manière suffisante par les États membres, tant au niveau central qu'à l'échelon régional ou local, et peuvent donc être mieux réalisées au niveau de l'Union (art. 3B trait. CE anc., ins. par traité Maastricht, TUE, a. 5).'

Subsidiaire. 'Adj. Lat. jur. *Subsidiaria*, dér de *subsidium*: 1. Qui a vocation à venir en second lieu (à titre de remède, de garantie, de suppléance, de consolation), pour le cas où ce qui est principal, primordial, vient à faire défaut (cependant un ordre à plusieurs degrés peut comporter un subsidiaire du subsidiaire, etc., jusqu'à l'*ultimum subsidium*). [...] 2. Par ext., secondaire, accessoire, auxiliaire (à titre de renfort). – (**action**). a/ Celle qui ne peut être exercée, à titre de garantie,

²⁴ G Cornu, *Vocabulaire juridique* (Association Henri Capitant ed, 12th edn, PUF 2018) 995. These entries are unchanged in substance from their originals: G Cornu (ed), *Vocabulaire Juridique* (1st edn, PUF 1987) 762.

qu'après échec d'une action principale (son exercice prématuré se heurterait à une exception dilatoire). *b/* Celle qui ne s'ouvre qu'en l'absence de toute autre action, lorsque cette absence d'action ne provient pas d'une cause légitime (autorité de la chose jugée, forclusion, etc., cas dans lesquels son exercice se heurterait à une fin de non-recevoir). Ex. action *de in rem verso*. – (**débiteur**). [...] – (**demande**). Celle qui a pour objet de procurer un avantage considéré comme un pis-aller pour le cas où la prétention principale serait rejetée. – (**moyen**). Celui qui est invoqué par une partie (ou développé par le juge), soit pour renforcer un moyen principal, soit pour suppléer celui-ci au cas où il serait écarté. – (**obligation**). Celle dont le paiement ne devient exigible que dans le cas où le créancier ne peut obtenir du débiteur principal (par ex. insolvable) l'exécution de la dette principale. [...]'

Subsidiarement. 'À titre subsidiaire (sens 1); s'emploie surtout dans les écritures du palais pour la présentation des objets et fins de la demande (et parfois dans un ordre croissant de surabondance de droit; ex. plus subsidiairement encore...).'

These are translated as follows.

Subsidiarity. 1. The quality of that which is subsidiary. Eg, Subsidiarity of the *action de in rem verso*. 2 (Eur). Character ascribed to one of the modes of action of the European Community. – (**principle of**). Guiding rule by virtue of which the Community only acts – outwith the bounds of its exclusive competence – if and in so far as the objectives of a proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, and so can be better achieved at Union level [...].

Subsidiary. *Adjective*. Leg[al]. Lat[in]. *Subsidiaria*, der[ived] from *subsidium*. 1. That which is intended to come in second place (for the purpose of remedy, guarantee, supplement, consolation), should that which is principal, primordial, fail (however, a multi-level order may

contain a sub-subsidiary element, etc., down to an *ultimum subsidium*). [...]

2. By ext[ension], secondary, accessory [or ancillary], auxiliary (intended to reinforce). – (**action**). *a/* That which can only be brought, by way of guarantee, after the failure of a principal action (its premature exercise would be prevented by a delaying obstacle [free translation]. *b/* That which is only open in the absence of any other action, when this absence [...] does not stem from a legitimate cause (*res judicata*, foreclosure, etc., cases in which its exercise would be barred). Ex[ample] *action de in rem verso*. – (**debtor**). [...] – (**claim**). That which aims to procure an advantage considered to be a last resort should the principal argumentation be rejected. – (**ground**). That which is invoked by a party (or developed by the judge) either in order to reinforce a principal ground, or to supplement the latter should it be set aside. – (**obligation**). That [obligation] the satisfaction of which only becomes exigible if the creditor cannot obtain performance by the principal debtor ([who may be] insolvent, for example) [in respect] of the principal debt [or performance of the primary obligation]. [...]

Subsidiarily. On a subsidiary basis ([in subsidiary's] first meaning); used especially in court documents for the presentation of the objects and ends of claims (and sometimes in a growing series of [grounds in] law; eg, yet more subsidiarily [or on a yet further subsidiary level]...).

Firstly, the existence of subsidiary and non-subsidiary entities is usually assumed throughout these definitions. The second instance of the noun *subsidiarité*, setting out the relevant principle of European Union law (further analysed below), is a good example of this, along with the emphasis on coming in second place in the first definition of the adjective *subsidaire*. So, too, is definition 2a of *subsidaire*: the action which fails does not appear to cease to exist. The examples given under *subsidaire*, and the elaboration on subsidiary claims under the adverb *subsidiairement*, are also instructive. Debtors – legal persons – and claims, and obligations, and legal arguments placed in front of a court, do not just disappear into thin air because they are unable to perform, ineffective, or unenforceable. They would have to be stripped of

personhood, or set aside, or struck from the court's record, or legally extinguished, in order that they might cease to exist. Their being subsidiary does not bear on that.

However, definition 2*b* of *subsidaire* appears to be imprecise. It does not seem possible for one thing to be subsidiary to something else, when that something else does not exist. It is like saying that one shelf is underneath another shelf on a wall, and the latter shelf is not there. It makes no sense. The usage reflected in definition 2*b* of *subsidaire* must be rejected for this reason.

Secondly, everything here except definition 2*b* of *subsidaire* would also seem to support the inference in a relationship of subsidiarity of a plurality of entities: one or more which are to *be* subsidiary to one or more which are not. The usage in definition 2*b* must also be rejected in this respect. It is not possible for *A* to be subsidiary to *B* if *B* does not exist. Subsidiarity stops once a plurality disappears.

Thirdly, the requirement that entities in a relationship of subsidiarity have the potential, without subsidiarity's presence, to overlap, also appears clearly. The European Union and its Member States' competences must be shared for subsidiarity to be relevant; two debtors in respect of the same debt; two claims in respect of the same set of facts; two obligations in respect of the same debt. Subsidiarity is about the prevention of this overlap. It would be pointless if no overlap were possible.

Fourthly, where is meta-authority here? The clearest hint of it is in the reference to European Union law, which will be analysed further below. For the most part, it is present by the omission of clear declarations that subsidiarity entails the direct subordination of one entity to the non-subsidiary entity by the former's authority, or that the subsidiary entity forcibly renders itself subsidiary to another entity. Something must cause and maintain a relationship of subsidiarity. If it is not one of the entities in that relationship, it must be something else. And that something else must possess authority over the relevant entities in order to impose a relationship of subsidiarity. As appears from the above examples, subsidiarity as meta-authority prevents overlap and imposes order on the entities which it governs, at least initially, until those entities are allowed to overlap. We might here instance the admission of several arguments at once, some subsidiary to others, as each is progressively set aside but does not

cease to exist. A clearer example, however, is the idea of a subsidiary obligation (*obligation subsidiaire*). What would make a non-subsidiary obligation? What would make a subsidiary obligation? It seems unlikely that each could just decide for itself what it could do in relation to the other. There would have to be a separate meta-rule which definitively regulated their interaction.²⁵

Fifthly, in the absence of any indication in the examples above that a non-subsidiary entity is in control of an entity which is subsidiary to it, and in the presence of the conclusion therefrom that meta-authority must regulate relationships of subsidiarity, it appears that no entity in a relationship of subsidiarity is sovereign over any other entity in that relationship.

Sixthly, it appears to flow from these definitions that the existence of a relationship of subsidiarity discounts the possibility of overlap between entities in that relationship. This is the very object of subsidiarity.

D. Bringing out meta-authority

It will be apparent from the foregoing that the most difficult feature to discern in the above definitions is meta-authority. It has been argued thus far that its presence is suggested by the subordinate or secondary nature of subsidiary entities, but which nature appears not to be due to traits which inhere, either in subsidiary entities, or non-subsidiary ones. This view might be objected to: if the source of control over a relationship of subsidiarity is not mentioned, there might be no reason to reach the conclusion favoured here; perhaps the source of control could be meta-authority, a subsidiary entity, or the non-subsidiary entity – precisely which might not matter.

To this objection, it might first be replied that meta-authority is clearly present in the Latin definition of subsidiarity set out above. And although teasing it from the English

²⁵ A possible example in French law is one kind of personal surety, *le cautionnement*, or personal guarantee. Its subsidiary nature is debated in France. But it is instanced here because it is a particularly accessible illustration of what, it is submitted, would be a correct use of subsidiarity, were French law so to think of it. The *Code civil*, art 2288, stipulates, outwith the rules on the contract of guarantee itself, that the guarantor under this regime is only obliged to the creditor if the debtor does not perform. For the minority view that this kind of guarantee is subsidiary, see, with contrary references, F Rouvière, 'Le caractère subsidiaire du cautionnement' [2011] RTD Com 689.

adjective requires more work with the practical examples given, meta-authority can be extracted easily from the English noun. The same is possible in French thanks to the examples given in the *Vocabulaire juridique*, which ameliorate the sparsity of the *Trésor de la langue française informatisé*. This is a good deal of evidence in meta-authority's favour. Conversely, if no inference about meta-authority is to be drawn, only a little need be added to the ideas of relief, support, help, second order and subordination to scotch all ambiguity: relief *at the behest*; *secondary and subordinate to* the non-subsidiary entity. It is difficult to believe that the diligent lexicographer, the 'harmless drudge, that busies himself in tracing the original, and detailing the signification of words',²⁶ would deliberately omit such small details in the face of what, if meta-authority were meant to be excluded, is a considerable body of evidence in its favour.

A second response to the objection stems from an analysis of the English noun *subsidiary*. Relevant definitions are set out here:²⁷

'1. a. A subsidiary or subordinate thing; something which provides additional support or assistance; an auxiliary, an aid. b. A body or organization which is controlled by another, esp. a subsidiary company (see subsidiary company n. at Special uses).

[...]

Special uses

[...]

subsidiary company n. a company controlled by a holding company (cf. sense [...] 1b [set out above]).'

²⁶ As defined by Samuel Johnson in his *A Dictionary of the English Language* ((1755) Times Books 1983).

²⁷ 'Subsidiary, Adj. and N.' (n 21).

Definition 1a here is in line with the non-special definitions of the adjective *subsidiary* and the noun *subsidiarity*: no mention of what subordinates one thing to another opens the door to the inference that meta-authority is responsible, and the evidence in favour of meta-authority under the noun *subsidiarity* and adjective *subsidiary*. What appears to differentiate the idea of a *subsidiary company*, defined in 1b, is that the non-subsidiary company *is sovereign* over the subsidiary company. The current United Kingdom companies legislation juxtaposes subsidiary and *holding* companies, and subsidiary and *parent* undertakings.²⁸ Those who hold assets control them. Parents tell children what to do.²⁹ And it is worth noting that the equivalent commercial entity in French law is simply called a *société contrôlée*.³⁰

The special nature of the English compound *subsidiary company* helps us to perceive meta-authority in the general definition of *subsidiarity*. Meta-authority is excluded in the former. It is hard to see in what other way this definition could justifiably be called a ‘special use’. First, the subsidiary and non-subsidiary company would co-exist. Secondly, we would be in the presence of a plurality of entities. Thirdly, the companies could, at least in principle, be capable of doing the same thing – overlapping. They might, for example, make the same investments, contract the same obligations, or be exposed to the same liabilities. Fourthly, their actions would not randomly concur with each other. The holding or parent company would see to that, and tell the subsidiary what to do. Of the features distilled from the general definitions of subsidiary in each language above, we are really left only with the points of interest about meta-authority and sovereignty on which the special definition of the noun *subsidiary* can stand out when compared with the general definitions. It seems reasonable to conclude that meta-authority is part of the general definition of subsidiary.

²⁸ Companies Act 2006 (UK) ss 1159, 1162.

²⁹ For the standard English definition of parent company in the *OED Online*, see ‘Parent, n. and Adj.2’ <<http://www.oed.com/view/Entry/137816>> accessed 22 August 2017: ‘Compounds [...] C 2 [...] parent company *n.* *Commercial Law* a company or organization which owns or controls a number of subsidiary companies or organizations.’

³⁰ *Code de commerce*, arts L-233-3, L-233-4.

II. CONTEXTUAL PERSPECTIVE

Having examined key ideas in linguistic definitions of subsidiarity in the first part of this chapter, we now turn to three contexts in which subsidiarity is used and has developed. It will be recalled that the six points of interest extracted above relate to: the non-determination by a rule of subsidiarity of the existence of any entity in a relationship of subsidiarity; the presence of at least two entities for a relationship of subsidiarity to exist; the potential for those entities to overlap, absent any rule of subsidiarity; the regulation of that relationship via an independent rule possessing meta-authority over the relevant entities; an absence of sovereignty in all entities said to be in a relationship of subsidiarity over others in that relationship; and a lack of free concurrence between entities said to be in that relationship.

These ideas are the framework for discussion, in this part of the chapter, of subsidiarity in Roman Catholic social doctrine, European Union law, European human rights law, after an overview of subsidiarity in these contexts. The small but relevant literature on subsidiarity in French private law is cited *ambulando*,³¹ along with other supplementary material.

It is helpful before proceeding to illustrate from a neutral context a key point, which is manifest in what follows: subsidiarity is fundamentally about the allocation of competence among entities, or groups of entities, *on a conditional basis*. This appears from the following observation by a majority of the Supreme Court of Canada. Subsidiarity is:³²

³¹ Unfortunately, one contribution's approach is too practical to be of theoretical assistance, so it is omitted from developments below: C David, 'Le principe de subsidiarité: droits privé et fiscal français et droit communautaire' in A Lévi (ed), *Droit et vie des affaires: Études à la mémoire d'Alain Sayag* (Litec 1997).

³² 114957 *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)* [2001] SCC 40, [2001] 2 SCR 241 [3] (L'Heureux-Dubé J, with whom Gonthier, Bastarache and Arbour JJ agreed), emphasis added. The judgment was given in English. Conditionality appears from the French translation in the form of suitability, *or not*, to perform a given action (emphasis added): 'Ce principe [de subsidiarité] veut que le niveau de gouvernement le mieux placé pour adopter et mettre en œuvre des législations *soit celui qui est le plus apte à le faire*, non seulement sur le plan de l'efficacité mais également parce qu'il est le plus proche des citoyens touchés et, par conséquent, le plus sensible à leurs besoins, aux particularités locales et à la diversité de la population.'

‘[T]he proposition that law-making and implementation *are often* best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.’

Several scholars agree that subsidiarity is characterised by the operation of a ‘rebuttable presumption’ as to where competence or authority lies.³³ As John Finniss says, subsidiarity’s force is ‘substantial but presumptive and defeasible’.³⁴ The conditionality of subsidiarity should be borne in mind throughout this part of the chapter. If it is absent on a given analysis, we should suspect spuriousness.

A. Summarising subsidiarities

To avoid repetition in succeeding sections, the positions on subsidiarity of Roman Catholic social doctrine, European Union law, and European human rights law, are outlined here.

In *Centesimus Annus*, John Paul II summarised Roman Catholic subsidiarity as follows:³⁵

‘[T]he principle of subsidiarity must be respected: a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.’

³³ T Horsley, ‘Space to Breathe: Subsidiarity, the Court of Justice and EU Free Movement Law’ (PhD Thesis, Edinburgh, 2011) 12-13, 29, 58; J Contesse, ‘Contestation and Deference in the Inter-American Human Rights System’ (2016) 79(2) Law & Contemp Probs 123, 125; A Føllesdal, ‘Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights – or Neither?’ (2016) 79(2) Law & Contemp Probs 147, 148-149; N Aroney, ‘Federalism and Subsidiarity: Principles and Processes in the Reform of the Australian Federation’ (2016) 44 Fed L Rev 1, 4 (word ‘rebuttable’ not used); M Cahill, ‘Theorizing Subsidiarity: A Rejoinder to Gareth Davies’ (2017) 15 Int J Const L 231, 232.

³⁴ J Finniss, ‘Subsidiarity’s Roots and History: Some Observations’ (2016) 61 Am J Juris 133, 134.

³⁵ *Encyclical Letter Centesimus Annus* (1991) [48] (original emphasis). See further M Evans, ‘The Principle of Subsidiarity as a Social and Political Principle in Catholic Social Teaching’ (2013) 3 Solidarity 44; P Brennan, ‘Subsidiarity in the Tradition of Catholic Social Doctrine’ in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer 2014).

This principle concerns the allocation of authority to act to the *best* level of society, with a presumption in favour of smaller associations – the smallest one(s) capable of performing a given action.³⁶ An accessible example is the Church’s endorsement of families’ helping other families, with careful state intervention when ‘families cannot fulfil their responsibilities’.³⁷ One can also instance economic regulation, stimulation and support by the state in times of crisis, for the benefit of the economy’s users.³⁸

Subsidiarity is also a principle of the European Union’s legal order. So far as relevant, article 5 of the Treaty on European Union (‘TEU’) provides:³⁹

‘3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.’

Here, there is a default presumption in favour of competence in the Member States. The Union may act in cases of shared competence for reasons of effectiveness. Union action is reviewable on subsidiarity grounds before the Court of Justice of the

³⁶ John XXIII, *Encyclical Letter Mater et Magistra* (1961) [52]-[53].

³⁷ *Catechism of the Catholic Church* (2nd rev ed, USSC 1997) §§2208-2209.

³⁸ *Compendium of the Social Doctrine of the Church* (Burns and Oates 2005) §§351-355.

³⁹ Consolidated Version of the Treaty on European Union [2016] OJ C202/1. From a large literature, see, eg, P Craig, ‘Subsidiarity: A Political and Legal Analysis’ (2012) 50 *JCMS* 72; GA Moens and J Trone, ‘The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacea or Placebo?’ (2015) 41 *J Legislation* 65. For a situation of subsidiarity within the wider context of competence and authority in the EU, see R Schütze, ‘EU Competences: Existence and Exercise’ in D Chalmers and A Arnall (eds), *The Oxford Handbook of European Union Law* (OUP 2015).

European Union ('CJEU').⁴⁰ A notable example of a reviewed initiative is legislation at Union level, aimed at regulating the market for tobacco products and improving public health by reducing tobacco usage, through restrictions on the ingredients of tobacco products and their external packaging. This initiative was unsuccessfully challenged by tobacco companies on the ground that the matter was one for Member States alone.⁴¹

The European Court of Human Rights ('ECtHR') has held that '[s]ubsidiarity is at the very basis' of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR' / 'the Convention'), 'stemming as it does from a joint reading of Articles 1 and 19'.⁴² These provisions, which confirm that both contracting parties and the ECtHR are bound by the ECHR framework, respectively state:

'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights [...]. It shall function on a permanent basis.'

One manifestation of subsidiarity within the ECHR framework is highlighted by the following observation of the ECtHR:⁴³

⁴⁰ Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2016] OJ C202/206, para 8; Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, art 263; *Estonia v Parliament and Council* [2015] CJEU C-508/13 [41]-[55].

⁴¹ *Philip Morris Brands v Secretary of State for Health* [2016] CJEU C-547/14, [2017] QB 327 [186], [213]-[228].

⁴² *Austin v United Kingdom* [2012] ECHR 459, (2012) 55 EHRR 14 [61]. See also *A v United Kingdom* [2009] ECHR 301, (2009) 49 EHRR 29 [154], [174]; Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, art 1 (not yet in force). See generally F Sudre (ed), *Le principe de subsidiarité au sens de la Convention européenne des droits de l'homme* (Anthemis 2014); A Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 HRLR 313. For a situation of subsidiarity in human rights law as a whole, see GL Neuman, 'Subsidiarity' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013).

⁴³ *De Souza Ribeiro v France* [2012] ECHR 2066, (2014) 59 EHRR 10 [77]. See N Bamforth, 'Articles 13 and 35(1), Subsidiarity, and the Effective Protection of European Convention Rights in National Law' (2016) 5 EHRLR 501.

‘By virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention.’

These provisions state:

‘Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

The Court may only deal with [a] matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.’

The ECtHR has discussed these provisions many times.⁴⁴ Whilst the default position is that ECHR violations will be dealt with domestically, the ECtHR may examine a complaint if there are no effective domestic remedies, or if these have been exhausted. For example, the ECtHR has proceeded to examine alleged Convention violations in relation to inhumane prison conditions, even when legal recourse was in theory available from the contracting state, because domestic remedies were not sufficiently available in practice.⁴⁵

⁴⁴ See, eg, *McFarlane v Ireland* [2010] ECHR 1272, (2011) 52 EHRR 20 [107]-[108], [112]; *Ananyev v Russia* [2012] ECHR 21, (2012) 55 EHRR 18 [93]-[99]; *Chiragov v Armenia* [2015] ECHR 587, (2016) 63 EHRR 9 [115]-[116]; *Ninos v Greece (French text)* [2018] ECHR 473 [33]-[34].

⁴⁵ *Varga v Hungary* [2015] ECHR 256, (2015) 61 EHRR 30 [44]-[65].

This subsection has briefly outlined subsidiarity in the contexts discussed below. We can now turn, in succeeding subsections, to the six points of interest derived from the linguistic analysis in the first part of this chapter.

B. Assumed existence of entities

It appears that, once in place as an operative rule or principle, subsidiarity is not concerned to determine whether a given entity to which it applies actually exists. This is simply assumed by a rule of subsidiarity. If, instead of simply conferring on a set of entities subsidiary and non-subsidiary statuses, a rule ‘disappeared’ one or more of those entities, it would become difficult to argue that the rule was one of subsidiarity. To be a rule of subsidiarity, it would seem necessary for a rule to create, maintain, or put an end to, a relationship of subsidiarity between entities. For a rule to destroy one or more of the entities the interaction of which it is supposed to manage might be thought to prevent it from carrying out these functions in relation to that entity. It would also seem to deal with a question of overlap in a less than conditional manner. Once an entity does not exist, there is no way for it eventually to become competent, even if a subsidiarity analysis suggests that it should. These intuitions are borne out in the contexts under consideration.

Let us first see what is the view of the Roman Catholic Church about the entities to which its principle of subsidiarity applies. Francis recently addressed the common good. He affirmed that its central concern is ‘respect for the human person as such’, and that ‘[i]t has also to do with the overall welfare of society and the development of *a variety of intermediate groups*, applying the principle of subsidiarity’.⁴⁶ It has also been said that:⁴⁷

‘Subsidiarity is first and foremost a form of assistance to the human person via the autonomy of intermediate bodies. Such assistance is

⁴⁶ *Encyclical Letter Laudato Si’* (2015) [157] (emphasis added). On the common good, see further John XIII, *Encyclical Letter Pacem in Terris* (1963) [53]-[79]; *Catechism of the Catholic Church* (n 37) §§1905-1912.

⁴⁷ Benedict XVI, *Encyclical Letter Caritas in Veritate* (2009) [57].

offered when individuals or groups are unable to accomplish something on their own [...].’

And that:⁴⁸

‘It is not, therefore, a question of whether there shall be group persons, or whether they are efficient or immediately useful to the state. Rather, the question is how these groups stand to one another and to the state.’

Catholic social doctrine therefore presumes the existence all the while of the individuals, groups, and associations, which subsidiarity regulates. The principle of subsidiarity is certainly not capable of making these beings and bodies disappear.

The same is true of subsidiarity in European Union law. Article 5(3) TEU cannot be applied so as to dissolve the Union. It would be strange if a provision which said nothing about that could undo a treaty and put an end to a legal person – the Union – created ‘for an unlimited period’,⁴⁹ to say nothing of all the Member States. Other material suggests that subsidiarity is not about wiping them from the face of the map, either.⁵⁰

A like impression is gleaned from European Human rights law. The ECtHR ‘function[s] on a permanent basis’.⁵¹ And ‘under the subsidiarity principle it falls first to the national authorities to redress any alleged violation of the Convention’.⁵² It would seem implausible for a principle which has the aim of delegating to contracting states responsibility for protecting Convention rights simultaneously to be concerned with deciding upon their existence. Articles 13 and 35(1) of the Convention, set out above, say nothing about doing that at all.

⁴⁸ R Hittinger, ‘The Coherence of the Four Basic Principles of Catholic Social Doctrine: An Interpretation’ in M Archer and P Donati (eds), *Pursuing the Common Good: How Solidarity and Subsidiarity Can Work Together* (Vatican City 2008) 109.

⁴⁹ TEU arts 47, 53.

⁵⁰ See, eg, the preamble to the Charter of Fundamental Rights of the European Union [2012] OJ C326/391: ‘This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States [...]’.

⁵¹ Convention for the Protection of Human Rights and Fundamental Freedoms, art 19.

⁵² *Mikhno v Ukraine* [2016] ECHR 723 [116].

One French author recognises the argument set out in this subsection, but seems simultaneously to contradict himself. Antoine Gouëzel says:⁵³

‘Subsidiarity conditions the liberation of the subsidiary element on the failure of the primary element. [...] The subsidiary element can [...] remain blocked, which entails that any [legal, ie statutory] action which would implement it must be rejected. This does not mean, however, that the subsidiary element must be considered to be non-existent as long as the primary element does not fail: its presence is an indisputable fact which must be taken into account [...].’

There is some difficulty here. Gouëzel seems to say that his subsidiarity can lead to the rejection, ie, to the *disappearance*, of an action before a court. He next declares a more general principle: that what he calls subsidiary elements continue to exist, even if his primary elements are properly performing their functions. An inconsistency appears. Gouëzel accepts that an action can itself be a relevant subsidiary element.⁵⁴ He also accepts that subsidiarity can make this action disappear. In affirming this ability of subsidiarity to evaporate an action at law – a subsidiary entity – Gouëzel gainsays his own basic principle. The latter, it is submitted, is entirely correct, and is borne out by the linguistic and contextual analyses thus far in this chapter.

As an idea, subsidiarity may *provide arguments* for any number of actions, like preserving the existence of some agents,⁵⁵ or their pre-existing internal power structures.⁵⁶ It can justify centralisation of power in some scenarios where this is appropriate, or even the creation of new agents with authority, for example, to

⁵³ A Gouëzel, *La subsidiarité en droit privé* (Economica 2013) no 319. My translation: ‘La subsidiarité subordonne le déblocage de l’élément subsidiaire à la défaillance de l’élément premier. [...] L’élément subsidiaire peut [...] rester bloqué, ce qui impose que toute action tendant à en obtenir la mise en œuvre soit rejetée. Cela ne signifie pas pour autant que l’élément subsidiaire doive être considéré comme inexistant tant que l’élément premier n’est pas défaillant: sa présence et un fait indiscutable qui doit être pris en compte [...].’

⁵⁴ He accepts that France’s *action de in rem verso* is subsidiary: *ibid*, nos 106-107.

⁵⁵ M Cahill, ‘Sovereignty, Liberalism and the Intelligibility of Attraction to Subsidiarity’ (2016) 61 *Am J Juris* 109, 120-122.

⁵⁶ GA Bermann, ‘Taking Subsidiarity Seriously: Federalism in the European Community and the United States’ (1994) 94 *Columbia L Rev* 331, 342-343.

represent local concerns in the face of overcentralisation.⁵⁷ However, these matters are simply expressions of subsidiarity's more general preoccupation, and the only thing that it *actually does* as an operative rule: to allocate competence or authority on a conditional basis. It is unconcerned with whether the entities to which authority might be allocated exist.

C. Plurality of entities

This is a relatively short point. Most scholars tacitly assume its correctness,⁵⁸ though some are explicit about it.⁵⁹ Analysis of the dictionaries disclosed that a relationship of subsidiarity positively requires the existence of at least two entities, or groups of entities. Without a plurality of entities, no relationship would be possible at all in a given context, and whatever authority existed in that context would lie unconditionally with the only relevantly extant entity.

The Roman Catholic Church teaches that:⁶⁰

'Subsidiarity respects personal dignity by recognizing in the person a subject who is always capable of giving something to others. [...] It is able to take account both of the manifold articulation of plans – *and therefore of the plurality of subjects* – as well as the coordination of those plans.'

⁵⁷ NW Barber, 'The Limited Modesty of Subsidiarity' (2005) 11 Eur LJ 308, 314, 319-320.

⁵⁸ See, eg, PS Berman, 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism' (2013) 20 Indiana J Global LS 665, 670, 688-690; T Endicott, 'Comity among Authorities' [2015] CLP 1, 8-11, 20-21.

⁵⁹ T Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50 JCMS 267, 268: 'subsidiarity is premised on the existence of at least two autonomous decision-making bodies, unified through the pursuit of a common objective'.

⁶⁰ Benedict XVI (n 47) [57] (emphasis added).

Hittinger says:⁶¹

‘As a principle regulating and coordinating a plurality of group-persons, subsidiarity presupposes a plurality of such persons, each having distinct common ends, kinds of united action, and modes of authority. [...] Take away social plurality and there is nothing that can correspond to the principle of subsidiarity.’

This seems difficult to disagree with. If the Member States of the European Union did not exist as a group, then there would be nothing for the Union to be subsidiary *to*. If the Union did not exist, then even if the Member States were ‘non-subsidiary’ in relation to other things, they could not be ‘non-subsidiary’ in relation to the Union. These points also hold true for relations between the states party to the ECHR, and the ECtHR. French private law scholars agree – more than one entity is required for subsidiarity to be relevant in a given context.⁶²

D. Potential for overlap

This goes to the central purpose of subsidiarity. For a rule of subsidiarity to be relevant in any context, at least two entities in that context must be capable of overlapping if unrestrained. Otherwise, there would be nothing for a conditional rule of subsidiarity to do.

⁶¹ Hittinger (n 48) 109, 119. See further R Hittinger, ‘Social Pluralism and Subsidiarity in Catholic Social Doctrine’ (2002) 16 *Annales theologici* 385; J Chaplin, ‘Subsidiarity and Social Pluralism’ in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer 2014).

⁶² J Raynard, ‘A propos de la subsidiarité en droit privé’ in C Atias and others (eds), *Mélanges [à la mémoire de] Christian Mouly* (Litec 1998) 132, 136; P Casson, ‘Le subsidiaire et le droit privé’ [2001] *RRJ* 143, 153; Gouëzel (n 53) nos 36, 47; C Habre, *La subsidiarité en droit privé* (LGDJ 2015) no 122 (tacitly).

When setting out the ‘principle of subsidiary function’,⁶³ the Encyclical *Quadragesimo Anno* states:⁶⁴

‘Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.’

Catholic social doctrine therefore assumes that subsidiarity is about resolving overlap in the activities of which individuals and associations of different sizes are capable. Were this not true, a principle like that set out in *Centesimus Annus*, above, would serve no purpose.

In the European Union context, it seems clear as a matter of fact that there are things which both Union and Member States are capable of doing. The arrangement between them is also premised upon their both being able, at least to some extent, to ‘assist each other in carrying out tasks which flow from the Treaties’.⁶⁵

We see the same assumption in European Human rights law. Articles 1 and 19 of the ECHR oblige both contracting states and the ECtHR to secure the Convention rights of those over whom the latter have jurisdiction. Subsidiarity establishes default competence in the contracting states and the case law of the ECtHR elaborates on when this position shifts. It would not need to do this unless both contracting states and the ECtHR could enforce Convention rights. And if that were not possible, there would be no need for subsidiarity, ‘a fundamental feature of the machinery of protection established by the Convention’.⁶⁶

⁶³ Pius XI, *Encyclical Letter Quadragesimo Anno* (1931) [80].

⁶⁴ *ibid.*, [79].

⁶⁵ TEU art 4(3).

⁶⁶ *MC and AC v Romania* [2016] ECHR 359 [57].

The French writers on subsidiarity in private law agree on this point: the potential for overlap is the *raison d'être* of subsidiarity.⁶⁷

It is again noted that overlap can occur in various ways, as the dictionaries showed. Thinking in terms of the allocation of competence or authority, it may be useful to highlight two possible modalities of overlap. The first has been called 'substantive' subsidiarity. That is where a question of *initial* allocation of competence or authority to two or more entities is to be answered using a subsidiarity principle. The second situation has been called 'instrumental' subsidiarity. That is where a question of *subsequent* overlap in the *exercise* of competence or authority by two or more agents, to which some competence or authority has already been allocated, is to be answered using a subsidiarity principle.⁶⁸ These understandings of subsidiarity evenly split the Supreme Court of Canada in 2010.⁶⁹ Both involve overlap. In the first situation, it is *potential*. In the second, it is *actual*.

E. Meta-authority

The linguistic analysis in the first part of this chapter suggested that for a rule of subsidiarity definitively to resolve questions of allocation and overlap, it must bind the relevant entities by constituting an independent, higher authority in relation to them. If this were not so, and the relevant entities could manage their relations without an

⁶⁷ Gouëzel treats this at some length: (n 53) nos 43-46. See also Raynard (n 62) 134: '[l]a subsidiarité apparaît [...] comme une technique prévenant un risque de contradiction de règles aux domaines concurrents'; Casson (n 62) 151: '[l]e subsidiaire joue un rôle essentiel dans la régulation des conflits générés par la coexistence de règles de droit ayant vocation à régir une même situation de fait'; Habre (n 62) no 1193 (original emphasis): 'la subsidiarité vise à instaurer un *ordre* dans un système de droit [...] en empêchant le concours entre des normes incompatibles ou contradictoires'. One author disputes that this is the only function of subsidiarity in its managing the relationship between obligations. But her analysis still commits her to the proposition that, at a higher level of generality than her account, constraints upon a plurality of entities in a subsidiarity regime prevent their overlapping: C Aubry de Maromont, 'Les obligations subsidiaires' [2018] RTD Civ 305.

⁶⁸ For the vocabulary, D Halberstam, 'Comparative Federalism and the Role of the Judiciary' in GA Caldiera, RD Kelemen and KE Whittington (eds), *The Oxford Handbook of Law and Politics* (OUP 2008) 152-154. For accord in substance, see A Mills, 'Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws' (2010) 32 U PA J Intl L 369, 378-384; N Aroney, 'Subsidiarity: European Lessons for Australia's Federal Balance' (2011) 39 Fed L Rev 213, 216-218; A Føllesdal, 'Subsidiarity and the Global Order' in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer 2014) 208.

⁶⁹ *Reference re Assisted Human Reproduction Act* [2010] SCC 61, [2010] 3 SCR 457 [72] (McLachlin CJ, with whom Binnie, Fish and Charron JJ agreed), [183] (LeBel and Deschamps JJ, with whom Abella and Rothstein JJ agreed).

independent, higher, organising rule (as, for example, would be the case if one of them were sovereign and could dictate any relevant interactions), there would be no need for subsidiarity. This is the subsidiarity as meta-authority point.⁷⁰ By this, it is meant that a rule of subsidiarity is what dictates whether the entities to which it applies have competence or authority, however they might behave if unrestrained.⁷¹ And the condition, howsoever framed, on which allocation takes place, goes to the general essence of subsidiarity. These points are borne out in the contexts under examination.

Roman Catholic social doctrine sees subsidiarity as a ‘universal authority’, which, in the eyes of the Church, governs conditions within states, and across the world between states.⁷² More generally, Catholic social doctrine, of which subsidiarity is part, emanates from the Church. The latter considers itself independent of society, especially the state, and capable of intervening authoritatively in social affairs, in particular those of the state.⁷³ So the Church is a meta-authority in relation to the individuals and associations the interaction of which it seeks to manage with subsidiarity.

In the European Union, member states and the Union are bound by the treaties and European Union law in general.⁷⁴ In particular, the principle of subsidiarity binds the Union.⁷⁵ And neither Union nor Member States can just amend the treaties, where subsidiarity is found. There is a procedure for that in article 48 of the TEU. European Union subsidiarity thus sits higher than, and separately, from the entities the interaction of which it manages.

⁷⁰ The search for adequate meta-authority to mediate the overlap of various layers of entities can prove endless and fruitless: S Banner, ‘Please Don’t Read the Title’ (1989) 50 Ohio St LJ 243, 250, 253–254. But, if problematic, the issue of eventual self-reference by a given authority in order to claim legitimacy does not arise here, since only one level of meta-authority is ever sought, and the legitimacy of that meta-authority is not at issue.

⁷¹ It is conceded that the entities to which a rule of subsidiarity applies may engage with the framing of the premise on which the rule operates. For the argument that they should, see Burbidge (n 17).

⁷² John XIII (n 46) [140]–[141].

⁷³ Pius XI, *Encyclical Letter Ubi Arcano Dei Consilio* (1922) [65]; Paul VI, *Encyclical Letter Gaudium et Spes* (1965) [76].

⁷⁴ For the Union, see, eg, TFEU art 263. For the Member states, see *Costa v Ente Nazionale per l’Energia Elettrica (ENEL)* [1964] EUECJ C-6/64, [1964] ECR 585, 593.

⁷⁵ *Estonia v Commission* [2009] EUECJ T-263/07 [52].

Under the ECHR, the relevant function of contracting states and the ECtHR – securing convention rights – is not framed as optional in nature by articles 1 and 19 of the Convention. There is a constant line of cases affirming the subsidiarity of the ECtHR to the member states in fulfilling their central objective, and how important this arrangement is.⁷⁶ The principle also features in a Protocol no 15 amending the Convention, which is not yet in force.⁷⁷ Once it is fully ratified, subsidiarity will be present in the Convention as a matter of language, not just interpretation. Even now, however, subsidiarity seems secure in practice. It is unlikely that either a disgruntled contracting state or the ECtHR could reverse their respective positions in the relationship of subsidiarity without amending the Convention. Rather, it would probably require a fully negotiated protocol or other Convention amendment. After all, this is what was thought necessary for Protocol 15, which was addressed at several conferences and requires unanimous assent.⁷⁸

Scholars have not seized on the argument made in this sub-section. Some do, however, appear to recognise that, when operating as a rule or principle of allocation, as opposed to a simple political or philosophical idea,⁷⁹ subsidiarity needs to bind the entities to which it applies. This is clear, for example, when writers ask questions like: ‘[w]hat does subsidiarity require?’⁸⁰ The French subsidiarity scholarship is inexplicit on this point. But it is possible to draw on work about the interaction in France of the *droit commun* with the *droit spécial* (or *droits spéciaux*), ie, general law and special legal regimes. Anglophone lawyers will be familiar with this dichotomy through the Latin

⁷⁶ In addition to the passages already set out above, see *Vučković v Serbia* [2014] ECHR 303, (2014) 59 EHRR 19 [69]; *Bahmanzadeh v United Kingdom* [2014] ECHR 1050, (2016) 63 EHRR SE2 [46]; *Gherghina v Romania* [2015] ECHR 807, (2015) 61 EHRR SE15 [83].

⁷⁷ Protocol No 15 art 1: ‘Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.’

⁷⁸ *ibid*, preamble and arts 6-7.

⁷⁹ Subsidiarity’s operation as an idea is addressed briefly in section B of this part of the chapter. But the former kind of operation is the more usually discussed. M Jachtenfuchs and N Krisch, ‘Subsidiarity in Global Governance’ (2016) 79(2) *Law & Contemp Probs* 1, 9-10: ‘Subsidiarity is typically understood primarily as a principle for allocating powers to different levels of governance, yet it may also provide guidance on how powers are to be exercised.’ For example, it may ‘find expression in procedural mechanisms, such as [...] certain forms of veto rights for lower levels as against potential encroachments’. However, ‘[a]s a default rule for the distribution of decision-making powers, subsidiarity is primarily an allocative principle’.

⁸⁰ NW Barber and R Ekins, ‘Situating Subsidiarity’ (2016) 61 *Am J Juris* 5, 8.

maxim specialia generalibus derogant.⁸¹ Some authors affirm that the *droit commun* is *subsidiary* to the *droits spéciaux*.⁸² But this is only possible because that state of affairs is *caused*, and relations between the two categories of laws are regulated, *by something*.⁸³ This something must possess authority in relation to the categories the interaction of which it controls,⁸⁴ and so be independent of them. There could be no relationship of subsidiarity if this something were just an element of one of the categories in the relationship. Such a relationship would simply be one of sovereignty or subjection, depending on one's point of view. A group of entities capable of organising their own relations does not need subsidiarity. In French law, there seems to exist an independent norm, potentially *sans texte*, according to which the *droit commun* applies in default of the *droits spéciaux*.⁸⁵ The norm also features in some legislation. One can instance article 1105 (ex art 1107) of the *Code civil*,⁸⁶ which assures the default application of general rules of contract law.⁸⁷ Its independence from the general and special rules is clear by its placement in the first chapter of the relevant title of the relevant book of the *Code civil*, headed 'Preliminary provisions' (*dispositions liminaires*). The maxim *specialia generalibus derogant* in French law, which can be conceived in terms of subsidiarity, is a meta-authority in relation to the general and special rules to which it applies.

⁸¹ On which, see H Roland and L Boyer, *Adages du droit français* (4th edn, Litec 1999) no 418. The maxim obviously conceals much complexity; the literature cited in this paragraph should be consulted for detail.

⁸² C Goldie-Genicon, *Contribution à l'étude des rapports entre le droit commun et le droit spécial des contrats* (LGDJ 2009) no 6; S Mauclair, *Recherche sur l'articulation entre le droit commun et le droit spécial en droit de la responsabilité civile extracontractuelle* (Fondation Varenne 2012) no 115ff esp 146ff; C Goldie-Genicon, 'Droit commun et droit spécial' (2013) 7 RD Assas 29, 30, 36; Habre (n 62) nos 1003-1008; N Balat, *Essai sur le droit commun* (LGDJ 2016) nos 82-101 esp 84-87.

⁸³ *Contra*, it seems, claiming that the subsidiarity of the *droit commun* follows from its nature, or as of right ('*de plein droit*') is Balat (n 82) no 92. For the author, this is because *droit commun* is law, which applies mandatorily, so its subsidiarity does not need to be recalled or, it would seem, based on any legislative text.

⁸⁴ For accord, see Raynard (n 62) 134: 'le classement hiérarchique qu'elle [la subsidiarité] présuppose procure d'ailleurs à la subsidiarité une franche neutralité, donc d'autant d'autorité'; Casson (n 62) 169: '[l]e subsidiaire institue une hiérarchie, un ordre que les sujets de droit n'ont pas la faculté de méconnaître ou d'écarter'; Gouëzel (n 53) no 91: 'la subsidiarité met en relation deux éléments possibles en indiquant lequel doit être préféré'. See also C Pérès-Dourdou, *La règle supplétive* (LGDJ 2004) nos 400-401 and note 334, no 435 and note 518.

⁸⁵ Among many other decisions, see Civ 1re, 7 December 2004, pourvoi n° 01-10271, *Bull civ I*, n° 307; [2005] RDC 681, observations by D Mazeaud: contracts; Civ 1re, 11 January 2005, pourvoi n° 02-19016, *Bull civ I*, n° 13; [2005] RTD Civ 375, observations by J Hauser: delictual liability; Com, 31 January 2012, pourvoi n° 10-24731, *Bull civ IV*, n° 23; [2012] D 493, observations by X Delpech: prescription.

⁸⁶ For its qualification as a rule of subsidiarity, see, eg, N Balat, 'Réforme du droit des contrats: et les conflits entre droit commun et droit spécial?' [2015] D 699, nos 1-2.

⁸⁷ On which, see N Blanc, 'Contrats nommés et innomés, un article disparu?' [2015] RDC 810; J Huet and A Ghozi, 'L'article 1105 nouveau du Code civil: modification suggérée' [2017] RDC 168.

F. Not sovereignty

The first part of this chapter showed that, for a relationship of subsidiarity to exist, no entity said to be part of that relationship can be sovereign over any other entity in that relationship. In such a situation, there would be nothing for subsidiarity to do, because authority in that context would be allocated *unconditionally*. This goes against the essence of subsidiarity. As outlined at the start of this part of the chapter, subsidiarity is a *conditional* idea. If understood as absolute, sovereignty is antithetical to subsidiarity.⁸⁸ If, for example, a doctrine of constitutional law renders federal undertakings immune from the legislative acts of provincial powers, then on the facts, federation and provinces are not in a relationship of subsidiarity.⁸⁹

The Catholic Church teaches that the violation of the principle of subsidiarity is a ‘disturbance of right order’.⁹⁰ Subsidiarity has been called a ‘most weighty principle, which cannot be set aside or changed, [and] remains fixed and unshaken in social philosophy’, pronounced under the Church’s ‘supreme authority upon social and economic matters’.⁹¹ There is no room for the sovereignty of any entity to which subsidiarity applies here, from the supra-national co-operative to the private individual.

So, too, in European Union law. The letter of article 5(3) TEU and the relevant case law are explicit. Subsidiarity only applies in areas outwith the ‘exclusive competence’ of the Union.⁹² A subsidiarity principle to regulate competences which the Union can either exercise or delegate to the Member States would be pointless.⁹³ And the binding nature of the subsidiarity principle, demonstrated in the immediately preceding

⁸⁸ It is not, of course, argued that *state* sovereignty works in absolute terms. It does not: N MacCormick, ‘On Sovereignty and Post-Sovereignty’, in his *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999). And it might never have done so: L Bretherton, ‘Sovereignty’ in N Adams, G Pattison and G Ward (eds), *The Oxford Handbook of Theology and Modern European Thought* (OUP 2013).

⁸⁹ *Canadian Western Bank v Alberta (Province)* [2007] SCC 22, [2007] 2 SCR 3 [45] (Binnie and LeBel JJ, with whom McLachlin CJ, Fish, Abella and Charron JJ agreed): ‘[t]he asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity’.

⁹⁰ Pius XI (n 63) [80].

⁹¹ *ibid*, [41], [79].

⁹² *British American Tobacco Investments and Imperial Tobacco (Approximation of laws)* [2002] EUECJ C-491/01, [2002] ECR I-11453 [179]; *Vischim v Commission* [2009] CJEU T-420/05, [2009] ECR II-3841 [223].

⁹³ TFEU art 2(1): ‘When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.’

subsection of this chapter, would be irreconcilable with the Union's exclusive competence.

Moreover, in European Human Rights law, neither the contracting states nor the ECtHR are exclusively competent to secure the protection of convention rights. That appears to be one of the bases upon which the Convention itself sits.

The French writers on subsidiarity in private law appear not to have addressed this point. But in other areas, many scholars believe that it is correct.⁹⁴ So, it has been said that 'subsidiarity is an alternative to sovereignty';⁹⁵ and that '[a]s pure concepts, sovereignty and subsidiarity are irreconcilable'.⁹⁶

G. Not concurrence

The linguistic analysis in part one of this chapter suggested that an extant relationship of subsidiarity is incompatible with the free concurrence of the entities said to be part of that relationship. Conditionality would be absent in such a situation, since competence would not be ordered in any way at all. The whole point of subsidiarity is to prevent concurrence which is happening, or might happen, in the sense explained in sub-section D of this part of the chapter. It is unsurprising that we find this borne out in each context under consideration.

As we have seen, Roman Catholic subsidiarity is premised on there being an ideal, or best, level of society at which a given function may be discharged.⁹⁷ Article 5(3) TEU is clearly framed on the assumption that the overlaps in initiatives by the European

⁹⁴ PD Marquardt, 'Subsidiary and Sovereignty in the European Union' (1994) 18 Fordham Intl LJ 616, 635; N MacCormick, 'Democracy and Subsidiarity in the European Commonwealth', in his *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) 142; P Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 Am J Intl Law 38, 58, 62-63, 66; I Roele, 'Sidelining Subsidiarity: United Nations Security Council "Legislation" and Its Infra-Law' (2016) 79(2) Law & Contemp Probs 189, 190-199; M Kumm, 'Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities and the Proper Domain of the Consent Requirement in International Law' (2016) 79(2) Law & Contemp Probs 239, passim; P Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions' (2016) 61 Am J Juris 51, 60-63 esp 62.

⁹⁵ Cahill, 'Attraction to Subsidiarity' (n 55) 123.

⁹⁶ M Cahill, 'Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach' (2017) 15 Int J Const L 201, 216.

⁹⁷ See also *Compendium of the Social Doctrine of the Church* (n 38) §§185-188.

Union and Member States, which would ensue in subsidiarity's absence, need to be regulated. The articulation of articles 13 and 35(1) ECHR is perhaps the clearest example on the point. The order in which contracting states and the ECtHR may hear alleged Convention violations is explicitly regulated by those provisions, as interpreted by the ECtHR. But it should be remembered that this is only the default position. It seems not antithetical to subsidiarity for there to be overlap – perhaps in the form of co-operation – in the exercise of competence by entities, *once it has been decided that a subsidiary entity is allowed to act*. The reserve troops under the Latin dictionary definition will be recalled here: it would be better to deploy them before those in the front line are dead.

Many scholars, including the French private lawyers writing on subsidiarity,⁹⁸ assume the correctness of the claim in this sub-section.⁹⁹ At least one, however, is explicit in agreement. As Golemboski puts it in an analysis of subsidiarity and constitutional federalism, both:¹⁰⁰

'[P]rescribe cooperation, not competition between state-level and national-level entities. [...] [T]hey both reject an assumption of competition between state and national authorities'.

⁹⁸ Raynard (n 62) 134: 'une méthode de résolution de conflits de normes par voie prophylactique'; Casson (n 62) 152: 'en cas d'antagonisme entre plusieurs règles de droit ou entre plusieurs modalités d'application d'une même norme susceptibles d'être utilisées, [c'est l'objet du subsidiaire] de départager ces concurrents en indiquant lequel doit la priorité à l'autre'; Gouëzel (n 53) nos 46-47; Habre (n 62) no 20.

⁹⁹ DZ Cass, 'The Word That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community' (1992) 29 CMLR 1107, 1128-1134; K Duncan, 'Subsidiary and Religious Establishments in the United States Constitution' (2007) 52 Vill L Rev 67, 72-74; J Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 145-147; A von Staden, 'The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 Int J Const L 1023, 1034-1038, 1048-1049; LD Weinberger, 'The Relationship Between Sphere Sovereignty and Subsidiarity' in M Evans and A Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer 2014) 59-60; SG Calabresi and LD Bickford, 'Federalism and Subsidiarity: Perspectives from US Constitutional Law' in JE Fleming and JT Levy (eds), *Federalism and Subsidiarity* (NYUP 2014) 148-158.

¹⁰⁰ D Golemboski, 'Federalism and the Catholic Principle of Subsidiarity' (2015) 45 Publius 526, 538, 540-541.

CONCLUSION:

PRINCIPLES OF SUBSIDIARITY

This chapter has addressed subsidiarity from linguistic and contextual perspectives, and formulated six principles which must be respected by users of the language of subsidiarity for that usage to be correct. This was done as follows. Firstly, this chapter suggested some limits to the linguistic meaning of subsidiarity. These limits were then used to explore subsidiarity in context in the second part of the chapter, in which it was suggested that the linguistic limits are confirmed by an examination of subsidiarity in Roman Catholic social doctrine, European Union law, and European human rights law. Thirdly, it was suggested throughout the second part of this chapter that conditionality goes to the essence of subsidiarity, and that its presence or absence indicates whether subsidiarity suitably describes a posited state of affairs. The overall analysis has permitted the formulation of six principles of subsidiarity relating to: first, the fact that a rule of subsidiarity is unconcerned with the existence of the entities to which it applies; secondly, the need for more than one such entity; thirdly, the potential, absent subsidiarity, for those entities to overlap in their actions or spheres of competence; fourthly, the possession by a rule of subsidiarity of meta-authority over, and independence from, the entities to which it applies; which leads, fifthly and sixthly, to a lack of sovereignty in the entities in a relationship of subsidiarity over each other, and an absence of concurrence between them. These principles may be collapsed into a three-pronged statement for ease of reference: subsidiarity requires (1) the existence of a plurality of entities (first and second principles); (2) which are capable of overlapping (third principle); (3) which overlap is dealt with by subsidiarity as meta-authority (fourth principle, with fifth and sixth principles as logical consequences thereof).

After the next chapter, which addresses the history and reasons for subsidiarity in unjust enrichment, the theory developed here will be applied to the law and scholarship on the subsidiarity of unjust enrichment. The key idea of conditionality will feature prominently in discussion. The principles will be the framework for that discussion, of key claims that unjust enrichment is somehow subsidiary. They may be stated as follows.

(1) *Existence*. Once in place as an operative rule or principle, subsidiarity is not concerned to determine whether a given entity to which it applies actually exists.

(2) *Plurality*. A relationship of subsidiarity positively requires the existence of at least two entities, or groups of entities.

(3) *Overlap*. For a rule of subsidiarity to be relevant in any context, at least two entities in that context must be capable of overlapping if unrestrained.

(4) *Meta-authority*. For a rule of subsidiarity definitively to resolve questions of allocation and overlap, it must bind the relevant entities by constituting an independent, higher authority in relation to them.

(5) *Not sovereignty*. For a relationship of subsidiarity to exist, no entity said to be part of that relationship can be sovereign over any other entity in that relationship.

(6) *Not concurrence*. An extant relationship of subsidiarity is incompatible with the free concurrence of the entities said to be part of that relationship.

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CHAPTER 3

SUBSIDIARITY IN UNJUST ENRICHMENT

Chapters 1 and 2 of this study examined unjust enrichment and subsidiarity separately. This chapter addresses subsidiarity within unjust enrichment. This is an ancient issue,¹ and the position elsewhere is interesting.² But we focus on modern sources in our main jurisdictions. The key questions are, first, what is the status of subsidiarity in the law and scholarship on unjust enrichment; and secondly, what reasons underpin that status?

I. ENGLISH LAW AND SCHOLARSHIP

Whilst not endorsed by English courts, the subsidiarity of unjust enrichment has a substantial foothold in mainstream commentary.

A. English law

English law does not explicitly recognise that unjust enrichment is *subsidiary* to other legal institutions. At most, the courts have endorsed some subsidiarity-like thinking,

¹ For example, Ulrich Huber granted a 'subsidiary' *actio de in rem verso* to A against C if A's contractual counterparty, B, were insolvent: *Praelectiones Juris Civilis*, vol II (1st edn, Franeker 1690) XV, III, 2. See further R Feenstra, 'Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: Its Origin and Its Influence in Roman-Dutch Law' in EJH Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (2nd edn, Duncker & Humblot 1999) 222-228.

² Other jurisdictions embracing versions of subsidiarity, not considered here, include Louisiana and Québec. See Louisiana Civil Code, art 2298: '[t]he remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule'; and, for a summary of the law, *Zaveri v Condor Petroleum Corporation* (2014) 27 F Supp 3d 695 (La West Dist Ct) 700-703 (Hill J); Civil Code of Québec, art 1494: '[e]nrichment or impoverishment is justified where it results [...] from the failure of the person impoverished to exercise a right of which he may avail himself or could have availed himself against the person enriched'; and, for a summary of the law, *Giroux v Hopson* [2012] QCCA 1718 [22]-[27], [53] (Rochette, Kasirer, and Fournier JJA). An action available to A against B which is useless due to B's insolvency does not prevent an unjustified enrichment action against C: *Pavage Rolland Fortier Inc v Caisse populaire Desjardins de La Plaine* [1998] RJQ 1221 (QCSC) [30]-[31] (Trudel J); affirmed [2001] CanLII 40171 (QCCA). But there remains general doubt whether routes to redress against B must be taken by A before A can sue C in unjustified enrichment. No: *Placements Triar Inc v Salama* [2002] JQ No 4320; [2002] CanLII 41174 (QCCA) [54]-[57] (Robert CJ, with whom Chamberland JA agreed). Yes: *Ultramar Ltd v Rimers* [2006] QCCQ 12349 [37]-[42] (Pisonnault J). Mere failure by the claimant to avail itself of other available remedies does not bar unjust enrichment in common law Canada: *Neles Controls Ltd v Canada* [2002] FCA 107 [14]-[16] (Malone JA, with whom Décary and Dharlow JJA agreed). *Contra*: *Elmford Construction Co v South Winston Properties Inc* (1999) 45 OR (3d) 588 (ONSC) [36] (Dunnet J); leave to appeal dismissed (2001) 59 OR (3d) 111 (ONCA).

minus the language. Sedley LJ once remarked that unjust enrichment is a weak legal doctrine.³ Weaker than what, his Lordship did not say. He later stated: ‘the law of restitution is [...] in its nature [...] a residual remedy’.⁴ What inspired these statements is unknown.⁵ Absent the vocabulary of subsidiarity, they cannot fairly be taken as a claim about it.

There is also a dictum of Lord Goff in *The Trident Beauty*,⁶ a case denying an unjust enrichment claim by the hirer of a vessel against the assignee (by way of security for a loan) of the owner’s right to hire, when the charterparty provided that the owner would refund all overpaid hire:⁷

‘[A]s between [the] shipowner[, Trident] and charterer[, Pan Ocean], there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution [against the assignee, Creditcorp,] both unnecessary and inappropriate.’

Some have cited this passage to support the view that unjust enrichment is subsidiary to contract law.⁸ Had he meant to invoke *subsidiarity*, his Lordship’s command of

³ *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2003] EWCA Civ 1446, [2004] QB 985 [192] (Butler-Sloss P agreeing) *a contrario*: restitution deals with cases left aside by ‘stronger doctrine[s] of law’; cited with approval in *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663 [86] (Munby J).

⁴ *Boake Allen Ltd v HM Revenue and Customs* [2006] EWCA Civ 25, [2006] STC 606 [98].

⁵ Though it has been suggested that they may have been influenced by Ross Grantham and Charles Rickett’s views, discussed below, and criticised in later chapters: C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [2-03].

⁶ *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161 (HL).

⁷ *ibid*, 164. Lord Lowry agreed with Lord Goff. Lord Woolf (with whom Lord Keith and Lord Slynn agreed) held that Creditcorp (i) was not responsible for Trident’s non-repayment, (ii) had an unqualified right to the hire, and (iii) was not a party against which Pan Ocean should have a claim ‘merely because’ of the assignment by Trident ‘merely because’ of Trident’s assignment: *ibid*, 170-172.

⁸ R Grantham and C Rickett, ‘Property Rights as a Legally Significant Event’ [2003] CLJ 717, 741-744 and notes 112, 118; R Havelock, ‘A Taxonomic Approach to Quantum Meruit’ (2016) 132 LQR 470, 473-474 and notes 33-34.

pertinent literature suggests that he would have done so.⁹ Instead, Lord Goff reasoned that Creditcorp's enrichment was justified by its contract with Trident:¹⁰

'[S]erious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract. Moreover, *it would in any event be unjust to do so in a case such as the present* where the defendant, Creditcorp, is not the mere recipient of a windfall but is an assignee who has purchased from Trident the right to receive the contractual debt which the plaintiff, Pan Ocean, is now seeking to recover from Creditcorp in restitution despite the facts that the relevant contract imposes on the assignor (Trident) an obligation of repayment in the circumstances in question, and that there is nothing in the assignment which even contemplates, still less imposes, any additional obligation on the assignee (Creditcorp) to repay.'

So *The Trident Beauty* is not about subsidiarity. One other judicial pronouncement is noteworthy. Lord Sumption once mentioned the general English preferences for concurrent liability in contract and tort, and an option between kinds of unjust enrichment claim. His Lordship cited textbook discussion about the subsidiarity of France's *action de in rem verso*, and described the two jurisdictions' approaches as 'divergent'.¹¹ The vocabulary of subsidiarity was not used.

⁹ In the last edition of the great work which his Lordship co-authored with Professor Gareth Jones, *The Law of Restitution* (3rd edn, Sweet & Maxwell 1986) 12, note 58, a long footnote refers to comparative work analysing, and often criticising, unjust enrichment's supposed subsidiarity (page references provided by the present writer): HC Gutteridge and RJA David, 'The Doctrine of Unjustified Enrichment' [1934] CLJ 204, 212, 218-221, questioning wholesale the subsidiarity of the French general unjustified enrichment action; W Friedmann, 'The Principle of Unjust Enrichment in English Law: A Study in Comparative Law, Part I' (1938) 16 Can Bar Rev 243, 261; JP Dawson, *Unjust Enrichment: A Comparative Analysis* ((1951) repr, Hein 1999) 106 and notes 118-120, noting that the meaning of subsidiarity 'in modern French law is far from clear'; B Nicholas, 'Unjustified Enrichment in the Civil Law and Louisiana Law, I' (1961) 36 Tulane L Rev 605, 633-641, calling subsidiarity 'a much debated and still obscure requirement', and commenting that a then-leading case could 'not be taken to mean what it apparently says'.

¹⁰ *The Trident Beauty* (n 6) 166 (emphasis added).

¹¹ *Test Claimants in the FII Group Litigation v HM Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 AC 337 [196].

In sum, England has seen rare judicial intuitions about a secondary status for unjust enrichment, and awareness of the position elsewhere. But, as a matter of authority, unjust enrichment is not *subsidiary*.

B. English scholarship

Critical comparative scholarship on the subsidiarity of unjust enrichment has been available to English lawyers since the 1930s.¹² The standout piece is Lionel Smith's review of civil and common law approaches from 2002, which relevantly concludes:¹³

'The relationship between unjustified enrichment and other claims is complex. Understanding it depends not only upon an understanding of the overall function of the law of unjustified enrichment, but also upon the history and philosophy underlying the structure of private law in a particular system. The common law does not know "subsidiarity" by that name, but elements of that relationship appear to be embedded in the law.'

Lord Wright lamented shortly that unjust enrichment had 'too long been depressed, at least in England, to the level of a subsidiary and dependent status'.¹⁴ But the first serious, and most important, positive claims about unjust enrichment's subsidiarity in

¹² See the works cited by Goff and Jones (n 9) 12, note 58, referred to above. See also, eg, B Dickson, 'Unjust Enrichment Claims: A Comparative Overview' [1995] CLJ 100, 113, 116-117, generally dissatisfied with French law. For neutral accounts, see, eg, K Zweigert and K Kötz (T Weir tr), *An Introduction to Comparative Law*, vol II ((1969) 1st edn, North-Holland 1977) 221-222; ((1984) 2nd rev edn, Clarendon 1987) 589-590; ((1996) 3rd edn, OUP 1998) 550-551; J Bell, S Boyron and S Whittaker, *Principles of French Law* (1st edn, OUP 1998) 417-418, though noting 'a degree of disagreement as to quite what [subsidiarity] means'. The latter authors later repeated their puzzlement, but further sympathised with calls for subsidiarity's abandonment 'as a control mechanism of *enrichissement sans cause*' in French law: *Principles of French Law* (2nd edn, OUP 2008) 437-438 and note 1135, citing [1998] JCP G, II, 10102, observations by G Viney on Civ 1re, 3 June 1997, calling subsidiarity a 'hazy notion'.

¹³ L Smith, 'Property, Subsidiarity and Unjust Enrichment' in D Johnston and R Zimmermann (eds), *Unjustified enrichment: key issues in comparative perspective* (CUP 2002) 623.

¹⁴ Lord Wright, 'Book Review: Unjust Enrichment, A Comparative Analysis' (1952) 100 U Pa L Rev 612, 612.

English law (or the common law more generally) were made by Ross Grantham and Charles Rickett. In their deepest study,¹⁵ they define subsidiarity as:¹⁶

‘[T]he relationship between two claims or doctrines where the scope and operation of one claim are constrained by another claim, even where all the elements of the former claim are made out. At its weakest, subsidiarity denotes the subordination of one claim where another claim in fact offers the plaintiff a basis of recovery. At its strongest, subsidiarity denies the availability of a claim because another claim is in principle available, even though on the facts it does not avail the plaintiff.’

They continue:¹⁷

‘Restorable or unjust enrichment [...] is subsidiary in the sense that the scope and operation of the principle of unjust enrichment are necessarily constrained by the scope and operation of the other core doctrines of the private law, being consent-based obligations (dominantly but not solely the law of contract), the law of property, and the law of wrongs (dominantly but not solely the common law of torts). [...] [U]njust enrichment is not a primary regulator of rights and duties. Rather, it is one that operates either to supplement these primary doctrines or in the interstitial spaces between the primary doctrines. This results from the very doctrinal structure of unjust enrichment itself.’

It is unclear what led Grantham and Rickett to adopt the language of subsidiarity, or draw on comparative scholarship.¹⁸ But in the piece under discussion, they commit to the former, and rely heavily on the latter to support, for example, their definition of

¹⁵ See also, eg, Grantham and Rickett, ‘Property Rights’ (n 8) 741-744; R Grantham, ‘The Equitable Basis of the Law of Restitution’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 365-371.

¹⁶ R Grantham and C Rickett, ‘On the Subsidiarity of Unjust Enrichment’ (2001) 117 LQR 273, 273 (emphasis added).

¹⁷ *ibid*, 273-274.

¹⁸ See, eg, R Grantham and C Rickett, ‘Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?’ [1997] NZ L Rev 668, 679-679: no language of subsidiarity; R Grantham and C Rickett, *Enrichment and Restitution in New Zealand* (Hart 2000) 51-53: language of subsidiarity; no comparative scholarship.

subsidiarity;¹⁹ their view that unjust enrichment is ‘necessarily supplementary of other doctrines of the private law, particularly contract and property’;²⁰ and the lack of a ‘role to play’ for unjust enrichment ‘where the consequences of a defect in subjective consent are already regulated, such that the restoration of the status quo ante is already provided for’ by law.²¹ In a concluding comparative detour, they state that it is ‘instructive to note that the operation of unjust enrichment in other jurisdictions is tied closely to a notion of its subsidiarity’, mention the French position, and cite comparative commentary.²² However, the authors ignore the inevitable complexity behind the assertion that a given jurisdiction embraces a version of subsidiarity to control unjust enrichment.²³ Nor do they mention the comparatists’ reproaches of subsidiarity. So, Barry Nicholas maintained, always,²⁴ that subsidiarity in French enrichment law is ‘one area [...] in which clarity and simplicity are noticeably lacking’;²⁵ and that the structure of the subsidiarity rules controlling the *action de in rem verso* in France is unhelpful, and does not serve the main policy behind it, which is a poor one, anyway.²⁶ Despite liberal reference to Nicholas, and others, Grantham and Rickett

¹⁹ Grantham and Rickett, ‘Subsidiarity’ (n 16) 273, note 2; citing, for ‘the meaning of subsidiarity, and in particular the distinction between its weak and strong senses’, B Nicholas, ‘Unjust Enrichment and Subsidiarity’, *Scintillae Iuris: studi in memoria di Gino Gorla*, vol III (Giuffrè 1994) 2038; L Smith, ‘Property, Subsidiarity, and Unjust Enrichment’ [2000] Oxford U Comparative L Forum 6 at ouclf.iuscomp.org (this being the original online version of the 2002 book chapter, discussed above).

²⁰ Grantham and Rickett, ‘Subsidiarity’ (n 16) 289, note 94; citing, inter alia, B Nicholas, ‘Modern Developments in the French Law of Unjustified Enrichment’ in PWL Russell (ed), *Unjustified Enrichment: A Comparative Study of the Law of Restitution* (VUUP 1996) 92. Other work cited in this footnote includes, in first place, D Laycock, ‘The Scope and Significance of Restitution’ (1989) 67 Texas L Rev 1277, 1278.

²¹ Grantham and Rickett, ‘Subsidiarity’ (n 16) 291, note 103; citing Nicholas, ‘Modern Developments’ (n 20) 94.

²² Grantham and Rickett, ‘Subsidiarity’ (n 16) 296-297 and notes 131-135; citing, inter alia, Gutteridge and David (n 9); B Nicholas, ‘The Louisiana Law of Unjustified Enrichment Through the Act of the Person Enriched’ (1991) 6/7 Tulane Civ L Forum 3; Nicholas, ‘Unjust Enrichment and Subsidiarity’ (n 19); Dickson (n 12); EJM Schrage and B Nicholas, ‘Unjust Enrichment and the Law of Restitution: A Comparison’ in EJM Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Duncker & Humblot 1995); Nicholas, ‘Modern Developments’ (n 20); K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir tr, (1996) 3rd edn, OUP 1998).

²³ As masterfully demonstrated by Smith, ‘Property, Subsidiarity, and Unjust Enrichment’ (n 19); cited with Nicholas’ work for ‘the meaning of subsidiarity’ by Grantham and Rickett, ‘Subsidiarity’ (n 16) 273, note 2.

²⁴ For his final views, see his contribution to the subsidiarity chapter in J Beatson and EJM Schrage (eds), *Cases, Materials and Text on Unjustified Enrichment* (Hart 2003) ch 7, 427-440.

²⁵ Nicholas, ‘Unjust Enrichment and Subsidiarity’ (n 19) 2038; cited by Grantham and Rickett, ‘Subsidiarity’ (n 16) 273, note 2, 297, note 131.

²⁶ Nicholas, ‘Unjust Enrichment and Subsidiarity’ (n 19); and Nicholas, ‘Modern Developments’ (n 20) 87-93; the latter piece being cited by Grantham and Rickett, ‘Subsidiarity’ (n 16) 273, note 2, 281, note 52, 289, note 94, 291, note 103, 297, note 132.

simply accept that *subsidiarity* is the best name for what they discuss, and that other jurisdictions' approaches are desirable. As this study will show, this is unfortunate.

Grantham and Rickett's views have been criticised by the editors of *Goff & Jones*.²⁷ First, they say, 'this terminology is unstable'. They instance the variety of regimes to which the language can refer, citing comparative work, such as Nicholas'.²⁸ Secondly, they opine that 'in common law systems the relationship between mutually interdependent bodies of law such as contract and unjust enrichment is more complex and more subtle than is suggested by the idea of a hierarchy of rights', implied by the language of 'subsidiarity' and 'primacy'.²⁹

These remarks, along with Professor Jones' earlier note of caution,³⁰ may have prevented Grantham and Rickett's account from being accepted universally in England. It has nevertheless influenced at least two authors' views that unjust enrichment is subsidiary,³¹ and others who support the concept are aware of it.³² Grantham and Rickett may fairly claim responsibility for subsidiarity's substantial place in modern English unjust enrichment scholarship. Before moving on, we should note why the authors endorse subsidiarity. They say that the subsidiarity of unjust enrichment must be articulated 'because of two pressures on the common law of unjust enrichment':³³

²⁷ See also, eg, M McInnes, 'The Equitable Action in Unjust Enrichment: Ambiguity and Error' (2007) 45 Can Bus LJ 253, 276-279.

²⁸ Mitchell, Mitchell and Watterson (n 5) [2-04] and note 5; citing, eg, Nicholas, 'Unjust Enrichment and Subsidiarity' (n 19); Nicholas, 'Modern Developments' (n 20); G van Maanen, 'Subsidiarity of the Action for Unjustified Enrichment – French Law and Dutch Law: Different Solutions for the Same Problem' (2006) 14 ERPL 409.

²⁹ Mitchell, Mitchell and Watterson (n 5) [2-04] and note 7; citing S Waddams, 'Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (OUP 2008).

³⁰ To the effect that, though some decisions can be analysed in terms of subsidiarity, Grantham and Rickett's account does not reflect the 'more pragmatic' approach of the English courts, and that Lionel Smith's view, discussed above, is more accurate: 'English law does not know the doctrine of subsidiarity by name. Its work is done through different concepts [...]' G Jones (ed), *Goff & Jones: The Law of Restitution* (6th edn, Sweet & Maxwell 2002) [1-061], note 78; (7th edn, Sweet & Maxwell 2007) [1-061], note 78.

³¹ See G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 133-134, note 5, citing the piece in support; and the heavier reliance upon it by Havelock (n 8) 476-477 and note 49, setting out Grantham and Rickett's definition of subsidiarity.

³² See, eg, its citation by A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 194, n 114, during his discussion of the relationship between unjust enrichment and property. Professor Burrows endorses subsidiarity in his *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 151.

³³ Grantham and Rickett, 'Subsidiarity' (n 16) 298-299.

‘The first pressure is from outside the common law system. It is the invitation to adopt the German technique, which is a particular challenge for England.^[34] It is not clear, however, that, once subsidiarity is out in the open, that technique offers anything “better”. The second pressure is from within the system, and it is more subtle and dangerous. The dominant model of unjust enrichment threatens to create all types of overlaps with, and even takeovers of, areas which belong to other core doctrines of the private common law. Subsidiarity is a key to “containing the beast”.^[35]’

Their primary reason for subsidiarity is unjust enrichment’s disruptive potential. This reflects the trend in subsidiarity-favouring scholarship.³⁶ The fear is understandable. Expressed generally since at least the burgeoning of money had and received,³⁷ it survives today, in both law,³⁸ and commentary.³⁹

C. A note on Australia

If only to forestall criticism for avoiding difficulties via choice of jurisdictions, something must be said about certain antipodean utterances. In his well known judgment in *Roxborough v Rothmans of Pall Mall Australia Ltd*,⁴⁰ Gummow J footnoted Grantham and Rickett’s main article in second place, supporting his vision of ‘the gap-filling and auxiliary role of restitutionary remedies’. Grantham has suggested (i) that this

³⁴ Footnote 142 cites *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 408-411, where Lord Hope summarised differences between common law and civilian approaches to unjust enrichment; and S Meier and R Zimmermann, ‘Judicial Development of the Law, Error Iuris, and the Law of Unjustified Enrichment – a View from Germany’ (1999) 115 LQR 556.

³⁵ Footnote 144 cites K Barker, ‘Unjust Enrichment: Containing the Beast’ (1995) 15 OJLS 457.

³⁶ See Virgo (n 31) 133-134 (explicitly); Havelock (n 8) 475-477 (implicitly).

³⁷ *Longchamp v Kenny* (1779) 1 Doug KB 137; 99 ER 91 (KB) 91 (Lord Mansfield): money had and received ‘must not be carried beyond its proper limits’. On money had and received, see J Baker, ‘The History of Quasi-Contract in English Law’ in W Cornish and others (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) 34-35, 47-53.

³⁸ See, eg, *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176 [31] (Lord Clarke, with whom Lord Neuberger, Lord Kerr and Lord Wilson agreed on this point): in determining whether an enrichment has been indirectly conferred on a defendant at the claimant’s expense, ‘it is important not to take a narrow view of what [...] would conflict with contracts between the parties or with a relevant third party in a way which would undermine the contract’.

³⁹ *Restatement (Third) of Restitution and Unjust Enrichment* (ALI 2011) §1 cmts a, d, rep note d.

⁴⁰ [2001] HCA 68, (2001) 208 CLR 516 [75] and notes 113-114; citing, in order, J Dietrich, *Restitution: A New Perspective* (Federation 1998) 28-35; Grantham and Rickett, ‘Subsidiarity’ (n 16) 289-293.

constituted an endorsement of the view that ‘restitutionary claims are subsidiary in nature’ (ii) by the High Court of Australia.⁴¹ As to (i), that Gummow J did not elevate the vocabulary from his footnotes to his main text suggests that he did not consider it important. Proposition (ii) is incorrect,⁴² because Gummow J wrote alone, with concurrence only in his orders,⁴³ and his statement was *obiter*.⁴⁴

‘It is fundamental to the ascertainment of the binding rule of a judicial decision that it should be derived from (1) the *reasons* of the judges agreeing in the order disposing of the proceedings; (2) upon a matter in issue in the proceedings; (3) upon which a decision is *necessary to arrive at that order*.’

Moreover, as a noted restitution sceptic,⁴⁵ if Gummow J had accepted subsidiarity to constrain unjust enrichment, he would likely have adopted it more forthrightly.

Though not an individual or *per curiam* reference to the subsidiarity of ‘restitutionary remedies’, it is right to concede that Gummow J’s dictum has bedded down in Australia.⁴⁶ Its most significant citation is by a unanimous New South Wales Court of Appeal, presided over by Mason P, in *Nikolic v Oladaily Pty Ltd*:⁴⁷

‘A second difficulty with the restitutionary claim [in this case] stems from the principle that a claim of this nature cannot be made where a valid contract covers the field. [...] *This subsidiarity doctrine* means that the contractual allocation of risk cannot be subverted by alleging a cause of

⁴¹ R Grantham, ‘Restitutionary Recovery Ex *Æquo Et Bono*’ [2002] Sing JLS 388, 397-398.

⁴² As Grantham knows, since he reproaches others in identical fashion: (n 15) 350, note 8; discussing the opinion of the judgments in *Roxborough* of B Kremer, ‘Restitution and Unconscientiousness: Another View’ (2003) 119 LQR 118.

⁴³ *Roxborough* (n 40) [31] (Gleeson CJ, and Gaudron and Hayne JJ). Kirby J dissented; Callinan J simply concurred.

⁴⁴ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 (HCA) [56] (Kirby J) emphasis added; cited in, eg, *Idya Pty Ltd v Anastasiou* [2008] NSWCA 102 [30] (Beazley JA, with whom Mason P agreed).

⁴⁵ See E Bant, ‘The Evolution of Unjust Enrichment and Restitution Law in the High Court of Australia’ [2017] RLR 121, 125-130.

⁴⁶ Referring to it, see, eg, *Haxton v Equuscorp Pty Ltd* [2010] VSCA 1, (2010) 28 VR 499 [123] (Dodds-Streaton JA, with whom Ashley and Neave JJA agreed); affirmed [2012] HCA 7, (2012) 246 CLR 498. Setting it out with footnotes: *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6, [2006] V ConvR 54-713 [44] (Nettle JA).

⁴⁷ [2007] NSWCA 252 [101] (Mason P, Campbell JA and Handley AJA), emphasis added.

action stemming from unjust enrichment covering the same conduct (see generally *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 545 [75] [(Gummow J)], 577 [166] [(Kirby J)]; *Coshott v Lenin* [2007] NSWCA 153).’

Mason P was not seriously invoking subsidiarity to explain restitution’s relationship with contract.⁴⁸ In *Zavodnyik v Alex Constructions Pty Ltd*,⁴⁹ his Honour sat on a bench which explained a comparable proposition without it. And in *Coshott v Lenin*,⁵⁰ his Honour cited the *Roxborough* passage, and *omitted* the language, in stating that ‘[i]n and around contract restitution operates in a gap-filling role’. The usage is too inconsistent for *subsidiarity*’s appearance to be significant. The leading Australian practitioners’ text (of which Keith Mason is an author) also uses the language which concerns us: ‘[r]estitution generally respects other legal transactions if and while they subsist and *it operates in a subsidiary or gap-filling manner*’.⁵¹ And in successive sentences, both *Roxborough*, and *Nikolic* are cited,⁵² a little before the following:⁵³

‘Restitution nevertheless has a significant gap-filling role supplementing and complementing the operation of contract law, for example, in respect of money overpaid due to a mistaken understanding of a contract’s operation. This *subsidiarity principle* is really an aspect of a broader concept, that (even when a claim for restitution is properly brought) primacy is to be given to any legal relationship that exists between the parties.’

⁴⁸ Sitting at first instance, his Honour also mentioned Grantham and Rickett’s article whilst recounting a submission by counsel that no ‘general principle about the subsidiarity of unjust enrichment, especially the idea that restitution cannot be invoked to trump a contractual allocation of risk’, had been infringed: *Concrete Constructions Group v Litevale Pty Ltd (No 2)* [2003] NSWSC 411 [16].

⁴⁹ [2005] NSWCA 438, (2005) 67 NSWLR 457 [30] (Handley JA, with whom Mason P and Latham J agreed): contract and restitution were ‘alternative and inconsistent [...]’. If there was an enforceable contract there could be no recovery in restitution and vice versa.’

⁵⁰ [2007] NSWCA 153 [10] (Mason P, with whom Spiegelman CJ and Campbell JA agreed).

⁵¹ K Mason, JW Carter and GJ Tolhurst, *Mason & Carter’s Restitution Law in Australia* (3rd edn, Lexis Nexis 2016), [109] (emphasis added).

⁵² *ibid*, [215] and notes 103-104; citing, *ex multis*, *Roxborough* (n 40) [75], [95] (Gummow J), [166] (Kirby J), for the proposition that ‘[o]nly rarely will the law of restitution operate in the context of an ineffective contract’; and, *ex multis*, *Nikolic* (n 47) [101] (Mason P, Campbell JA and Handley AJA), observing that ‘builders seeking to be remunerated at non-contractual rates will fail so long as an enforceable contract with the proprietor covers the relevant field and remains on foot’.

⁵³ Mason, Carter and Tolhurst (n 51) [215] (emphasis added).

Here, *subsidiarity* is not considered important, or even fully distinct. And it seems unlikely that Mason, a chief rehabilitator of restitution in Australia, would reach *consciously* for a stricture in subsidiarity which does not target the flaws he perceives in the law. Broadly, these relate, first, to the status of unjust enrichment as a concept in Australia,⁵⁴ and secondly, to equity and unconscionability's role in founding and conditioning restitutionary claims.⁵⁵ Subsidiarity does not feature in Mason's arguments about these matters, either solo,⁵⁶ or, perhaps as importantly, in relevant passages of *Restitution Law in Australia*.⁵⁷ To the extent that he might have influenced the content of the quoted passages, Mason may even have been against subsidiarity, if he turned his mind to it at all.

II. FRENCH LAW AND SCHOLARSHIP

In France, the subsidiarity of the *action de in rem verso* is well established in both law and commentary.

A. French law

The essentials of the law are addressed here. Detail comes later.⁵⁸ Article 1303-3 of the *Code civil* provides:

'The impoverished person has no action on this basis [ie, in unjustified enrichment] where another action [1.] is open to him or [2.] is barred by an obstacle of law, such as prescription.'

⁵⁴ Some features of which were expressed in *Roxborough* (n 40) [70]-[100] esp [72]-[74] (Gummow J); and approved in, eg, *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, (2014) 253 CLR 560 [73]-[74], [97] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁵⁵ A recent working out of which is in *AFSL* (n 54) esp [68], [74], [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁵⁶ See, eg, K Mason, 'What Has Equity to Do with Restitution? Does It Matter?' [2007] RLR 1; K Mason, 'Strong Coherence, Strong Fusion, Continuing Categorical Confusion: The High Court's Latest Contributions to the Law of Restitution' (2015) 39 Aust Bar Rev 284.

⁵⁷ Mason, Carter and Tolhurst (n 51) [120]-[123], [139].

⁵⁸ In particular, the permission to use the *action en enrichissement injustifié* even if one fails in *negotiorum gestio*, contained in the *Code civil*, art 1301-5, is left aside until chapter 9.

The report accompanying the 2016 reforms confirms that this provision enshrines the ‘subsidiary character’ of the *action en enrichissement injustifié*.⁵⁹ The *Cour de cassation* seems not yet to have addressed it. But lower courts have quickly got to grips. The *Cour d’appel* of Paris has referred to article 1303-3, and observed that ‘the so-called “action *de in rem verso*” [...] had and retains to this day a subsidiary character’.⁶⁰ It has also been said that ‘the subsidiary character of the action for unjustified enrichment’ is ‘reaffirmed and set out in’ article 1303-3,⁶¹ and ‘appears from a settled line of case law [*une jurisprudence constante*]’.⁶² So, where a delictual action remains open to a claimant, engaging article 1303-3’s first limb,⁶³ or a contractual action is barred by an obstacle of law, such as the failure to satisfy rules of proof, engaging article 1303-3’s second limb,⁶⁴ the *action en enrichissement injustifié* cannot be invoked instead.

The third main subsidiarity rule is that if an obstacle, not of *law*, but of *fact*, renders an action other than in unjustified enrichment practically useless, unjustified enrichment *may* avail a claimant instead. Where, for example, person A enriches person B pursuant to a statutory obligation, and person C is enriched in turn, then A may sue C *de in rem verso* if B is insolvent.⁶⁵ The courts have not yet confirmed this rule post-2016. But distinguished commentators preserve it with an *a contrario* reading of article 1303-3.⁶⁶ This rule, which we will call the obstacle of fact permission, is addressed in chapter 8.

⁵⁹ Ministère de la justice, ‘Rapport au Président de la République relatif à l’ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations’ [2016] JORF n° 0035, 11 February 2016, text n° 25 <<https://www.legifrance.gouv.fr/eli/rapport/2016/2/11/JUSC1522466P/jo/texte>>, under the title ‘L’enrichissement injustifié’. On the modest authority of the report, see P Puig, ‘L’autorité des rapports relatifs aux ordonnances’ [2017] RTD Civ 84.

⁶⁰ CA Paris, 27 June 2018, RG n° 16/17641: ‘l’action dite “*de in rem verso*” présentait et présente d’ailleurs toujours à ce jour un caractère subsidiaire’.

⁶¹ CA Aix-en-Provence, 26 October 2017, RG n° 13/12920.

⁶² CA Agen, 9 May 2018, RG n° 16/00044, referring also to article 1303-3.

⁶³ CA Paris, 22 December 2017, RG n° 14/19086.

⁶⁴ CA Agen, 9 May 2018 (n 62); CA Lyon, 13 March 2018, RG n° 16/05982.

⁶⁵ Civ 1re, 1 February 1984, pourvoi n° 82-15496, *Bull civ I*, n° 45; [1984] D 388, noted by J Massip; [1984] RTD Civ 712, observations by J Mestre.

⁶⁶ O Deshayes, T Genicon and Y-M Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations – Commentaire article par article* (2nd edn, Lexis Nexis 2018) 634. See also F Chénéde, *Le nouveau droit des obligations et des contrats* (2nd edn, Dalloz 2018) [134.34].

For completeness, we examine briefly the sporadic softening of subsidiarity by the courts, which occasionally grant unjustified enrichment actions despite the lack of proof (an obstacle of law) of certain contracts between persons in informal relationships. Take cases where a contract of *ad hoc* partnership,⁶⁷ or a management mandate,⁶⁸ between former cohabitants, could not be proved, and *actions de in rem verso* succeeded. The clear counterexample is where a loan contract (*contrat de prêt*), subject to particular rules of evidence (*ad hoc* partnership being provable by any means),⁶⁹ goes unproved. As with other contracts,⁷⁰ the courts will not then allow an unjustified enrichment action, whatever the parties' situation,⁷¹ though some cases decide the contrary.⁷²

The *Cour de cassation* has also ignored the subsidiarity rule in familial contexts, and granted unjustified enrichment actions to deserving claimants. Take the descendant of a rural tradesman (*un artisan rural*) working for him for free, but whose affairs were not a farming business (*une exploitation agricole*);⁷³ or the spouse of the descendant of a farmer who had worked for free, not for the family farming business, but that of

⁶⁷ *A contrat de société de fait*: Civ 1re, 15 October 1996, pourvoi n° 94-20472, *Bull civ I*, n° 357; [1997] D 177, noted by R Libchaber; [1997] RTD Civ 657, observations by J Mestre; Civ 1re, 4 May 2017, pourvoi n° 16-15563, *Bull civ I*, forthcoming; [2017] JCP G 790, noted by Y Dagorne-Labbe; [2017] D 1591, noted by A Gouëzel. See further A Gouëzel, 'Retour sur la subsidiarité de l'enrichissement sans cause en cas d'échec de l'action principale faute de preuve' [2017] D 1591.

⁶⁸ *A mandat de gestion*: Civ 1re, 25 June 2008, pourvoi n° 06-19556, *Bull civ I*, n° 185; [2008] RDC 1138, observations by Y-M Laithier; [2008] Defrénois 1980, observations by R Libchaber; [2008] Defrénois 2421, observations by J Massip.

⁶⁹ *Code civil*, art 1359; Civ 1re, 19 June 2008, pourvoi n° 07-13912, *Bull civ I*, n° 176. *Ad hoc* partnership: *Code civil*, arts 1832, 1873; Com, 13 March 1984, pourvoi n° 82-11866, *Bull civ IV*, n° 99. See further V Simon, 'L'affectio societatis' [2016] RDC 343; A Couret, 'Faut-il réécrire les articles 1832 et 1833 du code civil?' [2017] D 222.

⁷⁰ Civ 3e, 15 May 1973, pourvoi n° 72-11513, *Bull civ III*, n° 342; [1974] RTD Civ 148, observations by Y Loussouarn: option; Civ 1re, 2 November 2005, pourvoi n° 02-18723, *Bull civ I*, n° 398; [2006] D 842, observations by F Garron: services; CA Dijon, 31 August 2017, RG n° 14/02082: consumer credit.

⁷¹ Com, 2 November 2005, pourvoi n° 04-11946, *Bull civ IV*, n° 216; [2005] D 2943, noted by A Lienhard; Civ 1re, 2 April 2009, pourvoi n° 08-10742, *Bull civ I*, n° 74; [2009] Defrénois 1285, observations by E Savaux; [2009] RTD Civ 321, observations by B Fages; Civ 1re, 31 March 2011, pourvoi n° 09-13966, *Bull civ I*, n° 67; [2011] Cont conc consom n° 6, June, comm 136, commentary by L Leveneur; [2011] LPA 13 July n° 138, 21, noted by Y Dagorne-Labbe.

⁷² Civ 1re, 5 July 2006, pourvoi n° 04-19256: enrichment action allowed, despite a loan unproved for want of signature; Civ 3e, 11 February 2014, pourvoi n° 12-23322: enrichment action allowed, despite an unproved loan, but after sharp practice by the defendant, a commercial entity, towards the claimant, a private individual.

⁷³ Civ 1re, 20 December 1993, pourvoi n° 92-10134, *Bull civ I*, n° 383; [1994] JCP G, II, 22307, noted by F Roussel; [1994] RTD Civ 914, observations by J Patarin. On farming (*les activités agricoles*) see now *Code rural et de la pêche maritime*, art L311-1ff; and N Olszak, 'Agriculture', *Rép dr comm Dalloz* (2018). What qualifies as an *artisan rural* seems not to be the subject of a *general* legislative definition. See generally N Dissaux, 'Artisan', *Rép dr comm Dalloz* (2017).

her in-laws, and *after* her husband left the farm:⁷⁴ people *a priori* denied legislative recourse, falling as they did outwith special provisions granting a deferred wage (*une créance de salaire différé*) against the estates of those for whom they did unpaid work.⁷⁵

In these softer solutions, some see a new subsidiarity: unjustified enrichment is only excluded when it would circumvent the regime *normally applicable* to a given situation, with *exceptionally applicable* regimes not excluding the *action de in rem verso*.⁷⁶ This is vague, and does not improve on the current position.⁷⁷ A less controversial explanation for the courts' flexibility is the need to ensure a certain *équité*,⁷⁸ in informal contexts, unregulated by specific legislative regimes.⁷⁹ Some situations will likely continue to be treated *à part*, when the judges consider that justice requires it.

The reason for the courts' usually stringent enforcement of the subsidiarity rules is a policy favouring order in the legal system. The *Cour de Lyon* once observed that 'all *la jurisprudence* wanted to do in imposing a subsidiary character upon the *action de in rem verso* is prevent its being used as cover to bring about a change in the legal order, [...] in other words, to prevent fraud on the law [*fraude à la loi*]'.⁸⁰ Though French courts decide cases shortly, the same sentiment can be found elsewhere, as when an

⁷⁴ Civ 1re, 14 March 1995, pourvoi n° 93-13410, *Bull civ I*, n° 130; [1996] D 137, noted by V Barabé-Bouchard; [1995] JCP G, II, 22516, noted critically by F Roussel; [1996] RTD Civ 160, favourable observations by J Mestre; [1996] RTD Civ 215 guarded observations by J Patarin; [1996] Defrénois 468, noted by J-L Fillette. Roussel's note suggests that the conditions of a *créance de salaire différé* were satisfied on the facts, but would have entitled the claimant to far less than on the enrichment claim. This might evidence the *Cour de cassation*'s concern for *équité* in individual cases.

⁷⁵ See now *Code rural et de la pêche maritime*, arts L321-13 - L 321-21-1. Rejecting an *action de in rem verso* by a descendant failing to succeed within these provisions, see Civ 1re, 26 September 2007, pourvoi n° 06-14422, *Bull civ I*, n° 307; [2007] *Droit rural* n° 358, December, comm 353, noted by F Roussel.

⁷⁶ J Mestre and B Fages [2001] RTD Civ 591, observations on Com, 10 October 2000; B Fages [2009] RTD Civ 321, observations on Civ 1re, 2 April 2009. Around the turn of the century, this view gained some support from jurisprudential fluctuations: J Nguebou Toukam, 'Réflexions sur les applications contemporaines du principe de la subsidiarité dans l'enrichissement sans cause' [1997] RRJ 923, 929-931; L Chakirian, 'Vers une redéfinition du principe de subsidiarité de l'action de in rem verso' [2000] RRJ 1407, 1421-1423.

⁷⁷ J Flour, JL Aubert and E Savaux, *Les obligations, II: Le fait juridique* (14th edn, Sirey 2011) no 54.

⁷⁸ On which, see generally, C Albiges, 'Équité', *Rép civ Dalloz* (2017).

⁷⁹ V Barabé-Bouchard [1996] D 137, note on Civ 1re, 14 March 1995; R Libchaber [2008] Defrénois 1980; J Massip [2008] Defrénois 2421, observations on Civ 1re, 25 June 2008; E Savaux [2009] Defrénois 1285, observations on Civ 1re, 2 April 2009.

⁸⁰ *Cour de Lyon*, 27 June 1934; [1934] S, II, 219: 'tout ce qu'a voulu la jurisprudence en imposant à l'action de in rem verso un caractère subsidiaire c'est que, sous son couvert, ne pût se réaliser un changement de l'ordre juridique, [...] qu'en d'autres termes ne pût se commettre la fraude à la loi [...].'

action de in rem verso was denied, because to have allowed it would have ‘circumvented the rules of the contract invoked in the first instance’.⁸¹ This is a *specific* reflection of longstanding *general* angst, about the ‘supreme injustice’ which an unbridled principle against unjustified enrichment could cause.⁸²

B. French scholarship

As this study will show, scholarly references to the subsidiarity of the *action de in rem verso* are numerous.⁸³ Here, we simply note that, though denied or criticised periodically,⁸⁴ the proposition that the action is subsidiary is firmly established in mainstream literature. The dominant justification is the same as is (more rarely) found in the cases: the prevention of *fraude à la loi*.⁸⁵ Article 1303-3 of the *Code civil* ‘restricts [...] the scope of unjustified enrichment by preventing it from allowing the circumvention of other legal rules’.⁸⁶ The ‘subsidiarity of the action in unjustified enrichment is explained by its potential to disturb legal certainty’.⁸⁷ Averting ‘disorder’

⁸¹ Civ 1re, 8 December 1987, pourvoi n° 85-15767, *Bull civ I*, n° 335; [1988] RTD Civ 745, observations by J Mestre; CA Paris, 7 February 2007, RG n° 06/09844.

⁸² Cour Royale de Grenoble, 12 August 1836; [1837] S, II, 330; appeal dismissed Req, 6 November 1838; [1839] S, I, 160.

⁸³ Some early studies omit to consider it, eg, CC Stoïcesco, *De l'enrichissement sans cause* (Chevalier-Marescq 1904); D Budishtëano, *De l'enrichissement sans cause* (Sagot & Cie 1920).

⁸⁴ For denials, see G Raynaud, *De l'action «de in rem verso» en droit civil français* (LNDJ 1899) 82-95, 145, note 2; J Tartanson, *L'action ‘de in rem verso’ en droit civil français* (Chaspoul 1909) 111-115; and the tantalising one sentence repudiation of subsidiarity in a respected treatise: G Ripert and J Boulanger, *Traité de droit civil d’après le traité de Planiol*, vol II (5th edn, LGDJ 1957) no 1286. For criticism without denial, see A Colin and H Capitant, *Cours élémentaire de droit civil français*, vol II (6th edn, Dalloz 1931) no 240(4); P Roubier, ‘La position française en matière d’enrichissement sans cause’, *L’enrichissement sans cause – La représentation dans les actes juridiques, Travaux de l’Association Henri Capitant, IV: Journées néerlandaises* (Dalloz 1949) 54-55; J Chevallier, ‘Observations sur la répétition des enrichissements non causés’, *Le droit privé français au milieu du XXe siècle[.] études offertes à Georges Ripert*, vol II (LGDJ 1950) 246-247. For a modern denial, see, eg, A Gouëzel, *La subsidiarité en droit privé* (Economica 2013) nos 106-141 esp 135-140, and the references there given, advocating the abandonment of subsidiarity in direct enrichment cases due to a total overlap between that concept and the requirement that an enrichment be unjustified. As will be seen (in particular in chapters 4-6), this argument does not follow its own logic to conclude that where an enrichment is justified, the issue of subsidiarity does not arise. Also invoking the overlap argument, see P Rémy, ‘Le principe de subsidiarité de l’action de in rem verso en droit français’ in V Mannio and C Ophèle (eds), *L’enrichissement sans cause – La classification des sources des obligations* (LGDJ 2007). Rémy further argues that fluctuations in the cases, such as Civ 1re, 14 March 1995 (n 74), render subsidiarity worthy of rejection in favour of a more concrete approach.

⁸⁵ For a sceptical view, see A Posez, ‘La subsidiarité de l’enrichissement sans cause: étude de droit français à la lumière du droit comparé’ (2014) 91 *Rev dr int et comp* 185, no 25.

⁸⁶ L Andreu and N Thomassin, *Cours de droit des obligations* (3rd edn, Gualino/Lextenso 2018) no 1752: ‘Ce texte restreint [...] la portée de l’enrichissement sans cause en évitant qu’il permette un contournement d’autres règles juridiques’.

⁸⁷ R Cabrillac, *Droit des obligations* (13th edn, Dalloz 2018) no 214: ‘Cette subsidiarité de l’action en enrichissement sans cause s’explique par son caractère perturbateur pour la sécurité juridique’.

is the ‘obvious’ reason for subsidiarity here.⁸⁸ Again, this *specifically* reflects *general* worries about unjustified enrichment’s power. An unrestrained general rule has been described as ‘[t]his great current of *équité* which would cut across the law [and] would demolish institutions which protect interests like a house of cards’;⁸⁹ it could ‘explode the legal system’;⁹⁰ ‘[t]o admit an unconditional *action de in rem verso* would upset all legal rules, and lead to permanent anarchy.’⁹¹

However, the addition of a new member, François Chénéde, to the editorial team of a leading textbook on obligations produced, in late-2018, a forceful, important critique, of the subsidiarity of the *action en enrichissement injustifié*.⁹² Though accepting the dominant justification for subsidiarity,⁹³ the book now attacks the obstacle of law bar as ‘excessive and useless’.⁹⁴ Excessive, because the lack of proof element surpasses the rationale of subsidiarity (*enrichissement injustifié* can ‘hardly upset the rules applicable to a contract’ or other legal phenomenon ‘which does not exist’),⁹⁵ and goes beyond subsidiarity’s most obvious meaning: having no other route to redress, ‘it is perfectly normal for the claimant to be able to invoke, “on a subsidiary basis”, the *action de in rem verso*’. The uselessness argument extends to the other examples of obstacles of law, given in a 1971 decision of the *Cour de cassation*, addressed below. Each ‘constitutes a legal reason [...] liable to justify the benefit obtained by the defendant, to give a “legal ground [*cause*]” for his enrichment’. The book now concludes:⁹⁶

⁸⁸ The final view of B Starck, H Roland and L Boyer, *Droit civil: Les obligations*, vol II (6th edn, Litec 1998) no 2207. For the last words of other noted authors, see L Josserand, *Cours de droit civil positif français*, vol II (3rd edn, Sirey 1939) no 574; F Chabas (ed), *Leçons de droit civil de H, L et J Mazeaud*, vol II/1 (9th edn, Montchrestien 1998) nos 706-709; J Carbonnier, *Droit civil*, vol II (final def edn, PUF 2004) no 1228(c). For modern mainstream agreement, see A Bénabent, *Droit des obligations* (17th edn, LGDJ 2018) no 489; F Terré et al and F Chénéde, *Droit civil: Les obligations* (12th edn, Dalloz 2018) no 1309. Agreeing, whilst surveying other justifications put forward over time (which space does not permit here), see CP Filios, *L’enrichissement sans cause en droit privé français* (Bruylant 1999) nos 534, 544.

⁸⁹ G Ripert, *La règle morale dans les obligations civiles* (4th edn, LGDJ 1949) no 133: ‘Ce grand courant d’équité qui traverserait le droit abattrait comme château de cartes les institutions qui abritent les intérêts’.

⁹⁰ J Flour, ‘Pot-pourri autour d’un arrêt’ [1975] Defrénois, I, art 10845, 145, 186.

⁹¹ P Malaurie, L Aynès and P Stoffel-Munck, *Droit des obligations* (10th edn, LGDJ 2018) no 1056.

⁹² The *Précis Dalloz*, commenced by Alex Weill, and helmed by François Terre since the former’s early death (see the second edition’s preface): A Weill, *Droit civil: Les obligations* (1st edn, Dalloz 1971); A Weill and F Terré, *Droit civil: Les obligations* (2nd edn, Dalloz 1975).

⁹³ Terré et al and Chénéde (n 88) no 1309.

⁹⁴ *ibid*, no 1313.

⁹⁵ For agreement, but in only one sentence, see Bénabent (n 88) no 489.

⁹⁶ Terré et al and Chénéde (n 88) no 1313.

‘Ultimately, it appears that, as simplistic as it might seem, the formulation suggested by Aubry and Rau, adopted initially by the *Cour de cassation* [(a process addressed below)], better reflects the meaning and scope of the subsidiarity principle.’

These criticisms differ slightly from this study’s. Excess and uselessness are distinct from impossibility. However, some of the above is partially reflected later, especially in chapters 4-6. The weight of these authors’ authority cannot be underestimated in pondering what may happen to the French law on point in future.

C. A note on the history

To aid understanding later, three important movements towards the modern law are presented. In doing this, we add some detail to the history of the subsidiarity of the *action de in rem verso*.

First, germinal versions of both limbs of article 1303-3 appear in two decisions of the *Chambre civile of the Cour de cassation* from 1914 and 1915, the *arrêts Clayette* and *Briauhant*:

‘Considering that [1. – **other action open:**] the *action de in rem verso*, founded on the principle of *équité* which forbids one to enrich oneself at the expense of another, must be granted whenever the patrimony of one person is enriched at the expense of that of another without legal ground, and the other, to obtain what is due to him, has no other action arising from a contract, a quasi-contract, a delict or a quasi-delict; but that [2. – **obstacle of law:**] it [the action] cannot, during proceedings, replace a different action, originally founded on a contractual obligation of which the claimant finds it impossible to produce proof [...].’⁹⁷

⁹⁷ Civ, 12 May 1914; [1914] D Chron 56; [1914] Pandectes, Bull somm, I, 86; [1918] S, I, 41, noted by E Naquet (emphasis added): ‘Attendu [1.] que l’action *de in rem verso*, fondée sur le principe d’équité qui défend de s’enrichir au détriment d’autrui, doit être admise dans tous les cas où, le patrimoine d’une personne se trouvant, sans cause légitime, enrichi aux dépens de celui d’une autre personne, cette dernière ne jouirait, pour obtenir ce qui lui est dû, d’aucune action naissant d’un contrat, d’un quasi-

‘Considering that [1. – **other action open:**] the *action de in rem verso* must only be granted in cases in which, the patrimony of one person is enriched without legal ground at the expense of that of another, and the latter, to obtain what is due to him, has no other action arising from a contract, a quasi-contract, a delict or a quasi-delict, and that [2. – **obstacle of law:**] it [the action] cannot be brought with a view to escaping the rules by which statute [*la loi*] has expressly defined the effects of a specific contract, nor, as a result, [can it be brought] by a contractor to disguise a claim for extra costs, forbidden [...] in the presence of a fixed price contract [...].’⁹⁸

Secondly, in the *arrêt Gorge* of 1940, the *Cour de cassation* lent its *imprimatur* to the obstacle of fact permission, when a party impoverished had a practically useless contractual action against an insolvent individual, and was allowed to sue a third party *de in rem verso*.⁹⁹

Thirdly, in 1971, the *Troisième chambre civile* restated the subsidiarity rules:¹⁰⁰

‘Considering that [1.] the action founded on unjustified enrichment can only be admitted if no other action is open to the claimant; that [2.] it cannot be admitted, notably, to supplement another action which the claimant cannot bring as a result of prescription, a forfeiture, a time bar,

contrat, d'un délit ou d'un quasi-délit ; mais [2.] qu'elle ne peut pas être substituée, en cours d'instance, à une action différente, originairement fondée sur une obligation contractuelle dont le demandeur serait dans l'impossibilité légale de rapporter la preuve [...].’

⁹⁸ Civ, 2 March 1915; [1915] S, Bull somm, I, 20; [1920] DP, I, 102 (first case) (emphasis added): ‘Attendu [1.] que l'action de in rem verso ne doit être admise que dans les cas où le patrimoine d'une personne se trouvant sans cause légitime enrichi au détriment de celui d'une autre personne, celle-ci ne jouirait, pour obtenir ce qui lui est dû, d'aucune action naissant d'un contrat, d'un quasi-contrat, d'un délit ou d'un quasi-délit, et [2.] qu'elle ne peut être intentée en vue d'échapper aux règles par lesquelles la loi a expressément défini les effets d'un contrat déterminé, ni, par suite, par un entrepreneur, pour servir à déguiser une demande en supplément de prix prohibée [...] en cas de marché à forfait [...].’

⁹⁹ Req, 11 September 1940; [1940] Gaz Pal, II, 114; [1941] S, I, 121, noted by P Esmein.

¹⁰⁰ Civ 3e, 29 April 1971, pourvoi n° 70-10415, *Bull civ* III, n° 277; [1970-1971] Rapport annuel C cass 37; [1971] Gaz Pal, II, 554; [1971] RTD Civ 842, observations by Y Loussouarn: ‘[1.] [L]’action fondée sur l'enrichissement sans cause ne peut être admise qu'à défaut de toute autre action ouverte au demandeur; [2.] qu'elle ne peut l'être, notamment, pour suppléer à une autre action que le demandeur ne peut intenter par suite d'une prescription, d'une déchéance ou forclusion ou par l'effet de l'autorité de la chose jugée ou parce qu'il ne peut apporter les preuves qu'elle exige ou par suite de tout autre obstacle de droit [...].’

or because of the effect of *res judicata* or because he cannot produce the necessary proof or because of any other obstacle of law [...].'

In the first limb of this formula, the court linguistically shortened but legally broadened the first branch of the *Clayette-Briauhan*t holdings. In the second limb, the court generalised the second branch of those holdings into the obstacle of law bar, and gave useful examples thereof. This all looks much like today's article 1303-3.

But how do we get *subsidiarity* out of these decisions?

Not from *Clayette* or *Briauhan*t, for starters. The first half of their formulae appeared in lower courts nearly a decade previously.¹⁰¹ Borrowed from the noted *Cours de droit civil français* by Charles Aubry and Charles-Frédéric Rau,¹⁰² it existed in its essentials, without elaboration or justification,¹⁰³ from their first edition.¹⁰⁴ But because they do not put the vocabulary to the rules, their editions of the *Cours* cannot be the origin of the *subsidiarity* of the *action de in rem verso*. For the same reason, and contrary to what some say,¹⁰⁵ nor can *Clayette* or *Briauhan*t. Moreover, Karl Salomo Zachariä von

¹⁰¹ Trib civ de Lyon, 2 August 1899; [1899] Mon jud de Lyon, 2 August; [1897-1902] Tables cinq Gaz Pal 429.

¹⁰² For the last edition before the *arrêts Clayette* and *Briauhan*t, see C Aubry and CF Rau, *Cours de droit civil français d'après la méthode de Zachariae*, vol VI (4th edn, LDJ 1873) no 578(4): 'L'action de *in rem verso*, dont on ne trouve au Code civil que des applications spéciales, doit être admise d'une manière générale, comme sanction de la règle d'équité, qu'il n'est pas permis de s'enrichir aux dépens d'autrui, dans tous les cas où le patrimoine d'une personne se trouvant, sans cause légitime, enrichi au détriment de celui d'une autre personne, celle-ci ne jouirait, pour obtenir ce qui lui appartient ou ce qui lui est dû, d'aucune action naissant d'un contrat, d'un quasi-contrat, d'un délit ou d'un quasi-délit.'

¹⁰³ See, commenting on the fourth edition, P Chaine, *L'enrichissement sans cause dans le droit civil français* (Waltener & Cie 1909) 77-78. Chaine does not analyse the relevant passage in more detail or further address subsidiarity. This is understandable, since he thought that *enrichissement sans cause* was constituted by an enrichment which occurred outwith contract, quasi-contract, delict or quasi-delict, or any other method provided for by law: *ibid*, 6, 182.

¹⁰⁴ C Aubry and CF Rau, *Cours de droit civil français, traduit de l'allemand de M CS Zacharie, revu et augmenté, avec l'agrément de l'auteur*, vol IV (1st edn, Lagier 1844) no 576; and in volume II of the second edition (Meline, Cans et Cie 1850) no 576: *action de in rem verso* allowed if the claimant 'n'aurait à exercer aucune action naissant d'un contrat, d'un quasi-contrat, d'un délit ou d'un quasi-délit'. The formula was identical in the third edition, the title of which changed when the *Cours* took on a more independent form from the German work which inspired it: *Cours de droit civil français: d'après l'ouvrage allemand de C-S Zachariae*, vol V (3rd edn, LDJ 1857) no 576.

¹⁰⁵ Terré et al and Chénédé (n 88) no 1310: 'formulée pour la première fois en 1914 et en 1915, cette exigence [de subsidiarité] peut être interprétée de manière plus ou moins restrictive'; Posez (n 85) no 37, note 104, designating *Clayette* as 'l'origine de la notion'; Gouëzel (n 84) no 107; P Drakidis, 'La "subsidiarité", caractère spécifique et international de l'action d'enrichissement sans cause' [1961] RTD Civ 577, 580-581; F Goré, *L'enrichissement aux dépens d'autrui* (Dalloz 1949) 92-94, 188-192, even acknowledging that the cases do not put the word to the rules. Other cases similarly fail as candidates, eg, Civ, 18 October 1898, [1899] DP, I, 105, noted by LS; cited erroneously by, eg, J-M Augustin,

Lingenthal is not the rules' progenitor.¹⁰⁶ His *Handbuch des französischen Civilrechts*, which Aubry and Rau in part simply translated,¹⁰⁷ then further adapted,¹⁰⁸ to form their *Cours*, contains no formula like theirs, or the vocabulary which interests us.¹⁰⁹ Instead, the language of subsidiarity was imposed on Aubry and Rau by others,¹¹⁰ notably in the fifth (1917) edition of their *Cours*, annotated by Etienne Bartin.¹¹¹ Bartin does not cite the *arrêts Clayette* or *Briauhan*t, perhaps because they were not fully reported until 1918 and 1920 respectively.¹¹² Later commentators imposed the language of subsidiarity on those cases;¹¹³ and the *Cour de cassation* only put it to the first half of the *Clayette-Briauhan*t formula in 1951.¹¹⁴

'Introduction historique à l'enrichissement sans cause en droit français' in V Mannio and C Ophèle (eds), *L'enrichissement sans cause – la classification des sources des obligations* (LGDJ 2007) 39-40.

¹⁰⁶ *Contra*: Posez (n 85) no 4, stating that Zachariä presented subsidiarity and Aubry and Rau translated it; Drakidis (n 105) 581, stating the Aubry and Rau borrowed from Zachariä in turn.

¹⁰⁷ Eugène Gaudemet suggests that Aubry and Rau first worked on Zachariä's fourth edition: 'Aubry et Rau' [1923] RTD Civ 65, 76. But they probably took Zachariä's third instead. Aubry and Rau say that Zachariä's fourth edition was in the course of publication ('paraît en ce moment') when, in 1837, when they wrote the preface to their first edition; and that (i) in confining themselves to a straight translation of his third edition (1827), they would not have produced an up-to-date book for French lawyers; (ii) this was why, with Zachariä's agreement, they had also updated his work. See C Aubry and CF Rau, *Cours de droit civil français, traduit de l'allemand de M CS Zacharie, revu et augmenté, avec l'agrément de l'auteur*, vol I (1st edn, Lagier 1839) v, xi-xii: 'En nous astreignant à la reproduction exacte de l'original, sans nous permettre d'y apporter aucune modification, le Cours, dont nous publions la traduction, et dont la troisième édition date de 1827, n'aurait point été, en 1837, au courant des progrès de la science. [...] [N]ous avons préféré soumettre l'ouvrage de M Zachariae à un remaniement qui pût faire considérer notre traduction comme une nouvelle édition française de cet ouvrage. Nous ne pouvions entreprendre un semblable travail que du consentement de l'auteur, qui a daigné nous l'accorder avec une bienveillance dont nous le prions de recevoir nos remerciements publics.'

¹⁰⁸ Greater independence came in their third edition. See the relevant title change and prefatory remarks: C Aubry and CF Rau, *Cours de droit civil français: d'après l'ouvrage allemand de C-S Zachariae*, vol I (3rd edn, Cosse 1856) esp v-vii.

¹⁰⁹ Take, for example, KS Zachariä von Lingenthal, *Handbuch Des Französischen Civilrechts*, vol III (5th edn, Mohr 1853) no 576, this edition being the basis for Aubry and Rau's second, as confirmed by relevant front matter: C Aubry and CF Rau, *Cours de droit civil français, traduit de l'allemand de M CS Zacharie, revu et augmenté, avec l'agrément de l'auteur*, vol I (2nd edn, Meline, Cans et Cie 1850).

¹¹⁰ Eg, T Théodoroff, *De l'Enrichissement sans cause* (Rapide 1907) 168 and note 42.

¹¹¹ E Bartin (ed), *Cours de droit civil français d'après la méthode de Zachariae par C Aubry et C Rau*, vol IX (5th edn, LDJ 1917) no 578(4) note 10.

¹¹² Also missing the cases before the full reports, see eg, A Colin and H Capitant, *Cours élémentaire de droit civil français*, vol II (1st edn, Dalloz 1915) 405-409. Compare, however, the citation of a summary of *Briauhan*t (containing the phrase '*action subsidiaire*' in its keywords), and the imposition upon it of the vocabulary of subsidiarity, by J Maury, *Essai sur le rôle de la notion d'équivalence en droit civil français*, vol II (Jouve 1920) 264-266 and note 5. It is not actually easy to say whether Maury accepts subsidiarity. See *ibid*, 264-274.

¹¹³ See, eg, A Rouast, 'L'enrichissement sans cause et la jurisprudence civile' [1922] RTD Civ 35, 82; H Capitant, *Les grands arrêts de la jurisprudence civile* (1st edn, Dalloz 1934) no 108.

¹¹⁴ Civ, 29 January 1951, *Bull civ I*, n° 34. See, later, Civ 1re, 17 June 1997, pourvoi n° 95-17442; CA Pau, 14 November 2017, RG n° 15/04720; CA Nîmes, 22 February 2018, RG n° 16/04746.

As for the *Gorge* case, it is the first *French* decision in which the *Cour de cassation* used the expression ‘subsidiary character’ in relation to the *action de in rem verso*. But the court had used it the year before, too.¹¹⁵ Ruling on the codified *action de in rem verso* of Moroccan law, the *Chambre des requêtes* distinguished its status expressly from that of its subsidiary French analogue, though it is hard to discern precisely what was meant by this. And as we shall see momentarily, the vocabulary arrived in the French courts some time earlier than 1939.

Turning to the 1971 decision of the *Troisième chambre civile*, the language of subsidiarity was again imposed upon it by contemporary commentators without question.¹¹⁶ Several judgments have subsequently copied the formula, accompanied by the language.¹¹⁷ It comes from a casenote on the *Gorge* decision by Paul Esmein,¹¹⁸ whose views on the subsidiarity of the *action de in rem verso* are discussed in chapter 4.

It is uncertain when the vocabulary of subsidiarity entered French unjustified enrichment discourse. But we can say, first, that it arrived *earlier* than the *arrêts Clayette* and *Briauhan*: the oldest *scholarly* mention of the adjective *subsidaire* in relation to unjustified enrichment seems to be in Alphonse Berliner’s 1852 doctoral thesis, in which he states that ‘the *action de in rem verso* is only a subsidiary ground, granted in the absence of all other routes to redress’.¹¹⁹ This view was contradicted as early as 1899.¹²⁰ Among the better-known early twentieth century authors, Marcel Planiol was *perhaps* the first to invoke the adjective *subsidaire*, in describing the relationship between the *action de in rem verso* and vindication,¹²¹ an issue addressed in chapter 5.

¹¹⁵ Req, 20 April 1939; [1939] Gaz Pal, II, 102; [1940] RTD Civ 286, *critical observations by H and L Mazeaud*: ‘[A]ttendu que, contrairement à ce qui est pour la métropole, l’action de in rem verso en territoire du Protectorat de la République française au Maroc est codifiée par [des dispositions] qui n’en font à aucun titre une action d’un caractère essentiellement subsidiaire [...]’.

¹¹⁶ See the casenote by Y Loussouarn, [1971] RTD Civ 842. See also Weill and Terré (n 92) no 823 and note 4; J Carbonnier, *Droit civil, IV: Les obligations* (9th edn, PUF 1976) no 121.

¹¹⁷ CA Pau, 5 March 2009, RG n° 08/03017; CA Toulouse, 15 September 2009, RG n° 08/01040; CA Nancy, 9 May 2011, RG n° 09/01683; CA Besançon, 20 March 2013, RG n° 10/01034.

¹¹⁸ P Esmein [1940] S, I, 141.

¹¹⁹ A Berliner, *De l’action de in rem verso* (Silberman 1852) 31: ‘l’action de in rem verso n’est qu’un moyen subsidiaire, accordé à défaut de toute autre voie de revendication’.

¹²⁰ Raynaud (n 84) 82-93, 145, note 2, using the language of subsidiarity to refer to previous discussion.

¹²¹ M Planiol, *Traité élémentaire de droit civil*, vol II (3rd edn, LGDJ 1905) no 935. Compare M Planiol, *Traité élémentaire de droit civil*, vol II (2nd edn, Cotillon-Pichon 1902) no 935.

We can also say, secondly, that subsidiarity arrived *later* than the *arrêts Clayette* and *Briauhan*, thanks to *lower courts*. The oldest judicial endorsement of the ‘*caractère subsidiaire*’ of the *action de in rem verso* which it has been possible to trace is in a 1934 decision of the *Cour de Lyon*,¹²² in which the obstacle of fact permission was applied, and an example of what we now know as the obstacle of law bar (a person’s letting a contractual action go by) was endorsed in an *obiter dictum*.¹²³ In 1936, the *Tribunal de St-Jean-d’Angely* applied a version of the obstacle of law bar, where a person had let a statutory route to redress go by her, holding that, ‘indeed, the *action de in rem verso* has only a subsidiary character’.¹²⁴ And in 1937, the *Cour d’appel* of Paris stated, *obiter*, that letting another route to redress go by would exclude an unjustified enrichment action. It then rejected such an action in the presence of an open contractual action, setting out the first *Clayette-Briauhan* limb almost verbatim. Crucially, for our purposes, it described the *action de in rem verso* as ‘subsidiary’.¹²⁵ So before the *Cour de cassation* had even endorsed the obstacle of fact permission in terms of subsidiarity, judges in lower courts had done this for all the modern rules. Their contribution to the subsidiarity of the *action de in rem verso* remains substantial, as demonstrated by discussion and footnotes throughout this study.

III. SCOTS LAW AND SCHOLARSHIP

Though Scottish judges have accepted subsidiarity, whereas their English counterparts have not, they are not so enamoured with it as their French cousins. In scholarship, subsidiarity is strong, but commentators are often quite critical.

A. Scots law

Subsidiarity’s foothold in the cases is modest: there are really only two relevant decisions. Three other cases, often cited as having employed the doctrine, must briefly be examined, too.

¹²² CA Lyon, 27 June 1934 (n 80).

¹²³ For a rare consideration of this phenomenon from a French perspective, see S Tournaux, ‘L’obiter dictum de la Cour de cassation’ [2011] RTD Civ 45.

¹²⁴ Trib de St-Jean-d’Angely, 27 February 1936; [1936] S, II, 173.

¹²⁵ CA Paris, 21 April 1937; [1937] Gaz Pal, II, 426.

In the first real subsidiarity case, *Transco Plc v Glasgow City Council*,¹²⁶ the pursuer failed in unjustified enrichment for recompense of outlay in performing the defender's statutory obligation to keep up a bridge.¹²⁷ '[T]he parties did not dispute the subsidiarity of the remedy of recompense', and, following *Varney (Scotland) Ltd v Lanark Burgh Council*,¹²⁸ Lord Hodge accepted a 'general rule excluding recompense if the pursuer [fails] to pursue another remedy either at common law or under statute'.¹²⁹ This was subject to the establishment by the pursuer of 'special and strong circumstances to justify an action of recompense where there was, or had been, an alternative remedy open to the pursuer'.¹³⁰ Transco had not proved that the repairs were urgent or that consulting the Council before conducting works was impracticable. And it had not, as was its right, sued the Council for implement of its repairing obligation. In simply commissioning the repairs, then suing in unjustified enrichment, Transco deprived the Council of the opportunities to de-list the bridge, and escape its obligation; and to assess whether it was really obliged to do the works.

Lord Hodge clearly imposed the language of subsidiarity on *Varney*, and discussed four other decisions under that rubric, none of which invoked it.¹³¹ Overall, *Transco* is an imposed enrichment case, rationalising as an example of unjustified enrichment's subsidiarity the denial of an unjustified enrichment claim for the remedy of recompense, when another (statutory) route to redress was concurrently available to the pursuer at the time of the enrichment claim. The clear rationale for this decision was the protection of the council's freedom of choice, and the public finances.¹³²

¹²⁶ [2005] CSOH 76, 2005 SLT 958.

¹²⁷ The defender's obligation had to be assumed: *ibid*, [2] (Lord Hodge).

¹²⁸ 1974 SC 245 (IH).

¹²⁹ *Transco* (n 126) [16].

¹³⁰ *ibid*, [16], [18]-[19] (Lord Hodge); citing *Varney* (n 128) esp 259-260 (Lord Fraser); and *Property Selection & Investment Trust Ltd v United Friendly Insurance Plc* 1999 SLT 975 (OH) 985 (Lord Macfadyen).

¹³¹ *Transco* (n 126) [17], [19]; citing, in the order in which they appear in Lord Hodge's opinion, *City of Glasgow DC v Morrison McChlery & Co* 1985 SC 52 (IH); *Property Selection* (n 130); *Northern Lighthouses Commissioners v Edmonston* (1908) 16 SLT 439 (OH); and *Lawrence Building Co Ltd v Lanarkshire CC* 1978 SC 30 (IH).

¹³² *Transco* (n 126) [17]-[18].

In the second real subsidiarity case, *Courtney's Executors v Campbell*,¹³³ the pursuers failed in unjustified enrichment for restitution and recompense of money and non-money benefits conferred during the deceased's cohabitation with the defender. The relationship ended in 2013; the case started in 2016.¹³⁴ Statute provides for the discretionary financial redress of economic advantage or disadvantage during cohabitation, but under a *strict* one year time limit following its cessation.¹³⁵ The executors failed to establish the 'special and strong circumstances' required to proceed late in unjustified enrichment.¹³⁶ The deceased could have sought legal advice earlier than he did, and his circumstances would obtain in many financial redress claims. None of this displaced the policy of discouraging stale claims, implicit in the short time limit.

Lord Beckett's discussion took place beneath the subheading of 'Subsidiarity'.¹³⁷ The vocabulary was used extensively, and imposed on several cases.¹³⁸ This lends legitimacy to discussion in conceptual terms of subsidiarity. And unlike in *Transco*, Lord Beckett confirmed that, absent 'special and strong circumstances', *all types* of unjustified enrichment claim are 'available only when no other legal remedy is or has been available'.¹³⁹

Overall, *Courtney's* is an enrichment by transfer case, which rationalises as an example of unjustified enrichment's subsidiarity the denial of unjustified enrichment claims in general, where another statutory route to redress was barred at the time of an enrichment claim. The reason for the decision was the need to preserve the policy behind the one year statutory time limit.¹⁴⁰

¹³³ [2016] CSOH 136, 2017 SCLR 387.

¹³⁴ *ibid*, [1], [12], [41]. Lord Beckett does not say exactly when Courtney died.

¹³⁵ And *not* breakdown of the relationship: Family Law (Scotland) Act 2006, ss 28, 29A. See *Courtney's Executors* (n 133) [49]-[50]; citing *Simpson v Downie* [2012] CSIH 74, 2013 SLT 178, on the strict time limit.

¹³⁶ *Courtney's Executors* (n 133) [66]-[70] (Lord Beckett).

¹³⁷ *ibid*, [47]-[71].

¹³⁸ *ibid*, [53]-[59], [62]-[64], [66]; discussing (in the order in which they appear in Lord Beckett's opinion) *Varney* (n 128); *Transco* (n 126); *Lawrence, Inner House* (n 131); *Newton v Newton* 1925 SC 715 (IH); *Bennett v Carse* 1990 SLT 454 (OH); *Devos Gebroeder NV v Sunderland Sportswear Ltd (No 2)* 1990 SC 291 (IH); *Morrison McChlery* (n 131). Of the decisions cited, only *Transco* mentions subsidiarity.

¹³⁹ *Courtney's Executors* (n 133) [52]-[54], [57]-[58], [60].

¹⁴⁰ *ibid*, [69].

Subsidiarity's presence in Scots enrichment law is exaggerated by discussion, in the above cases, and much scholarship, of authorities which do not use the vocabulary. Where possible, such decisions are highlighted in subsequent chapters, and the error of rationalising them in terms of subsidiarity explained (whether in main text or footnotes). This is done now, though, for three notable cases which are *not* addressed later.

First, in *Varney (Scotland) Ltd v Lanark Burgh Council*,¹⁴¹ a burgh was bound by statute at least to reimburse for work done by the pursuer, who claimed unsuccessfully in recompense when unpaid. The Lord Justice Clerk (Wheatley) referenced a passage from Lord Kames' *Principles of Equity* in holding that 'the doctrine of recompense cannot be invoked when another legal remedy is available to the pursuers'.¹⁴² This is addressed below. His Lordship further cited *Stewart v Steuart*¹⁴³ as 'a case in point', but it is simply a decision denying recompense for want of loss. Light on authority, his Lordship's opinion makes a policy decision against foisting an uncoded liability onto another obliged to cover it, when performance of the relevant obligation could be compelled. Lord Kissen 'did not find much assistance in' the Kames passage.¹⁴⁴ He could not 'see how an equitable remedy [might] be invoked when another remedy given by statute or, indeed, by common law was available and was not used', and incorrectly cited the *Stewart* case, also. Lord Fraser's opinion has lasted better. It identifies benefit, loss and absence of donative intent as 'clearly essential' factors in recompense, and holds that 'the whole circumstances of the case must be such that it would be equitable for the pursuers to be reimbursed by the defenders on the basis of *quantum lucrati*'.¹⁴⁵ The pursuer failed here.¹⁴⁶ It 'took the risk of being able to pin legal liability on the' burgh, and could not be allowed to sue in recompense upon

¹⁴¹ *Varney* (n 128).

¹⁴² *ibid*, 250, 252-253.

¹⁴³ (1878) 6 R 145 (IH). There, the pursuer inherited land to which water rates had accrued in respect of a supply from it to other land held by the defender (both plots having belonged to another, deceased, who had diverted water to create the supply and obtained the court's approval to charge rates). The defender did not pay the pursuer; rightly, it was held, because there was neither statutory nor contractual right in the pursuer to charge rates. So the pursuer claimed in recompense instead. This claim was denied because the pursuer had suffered no loss. He had expended nothing on the water supply, and could only cut it off to the defender's land: *ibid*, esp 148-149 (Lord President Inglis, with whom Lord Deas agreed in the result, adding his own reasoning, Lord Shand simply agreeing with both of them).

¹⁴⁴ *Varney* (n 128) 255.

¹⁴⁵ *ibid*, 258.

¹⁴⁶ *ibid*, 259-260.

finding this impossible. To do otherwise 'would open the door very wide for any party to short-cut proper procedure'. His Lordship cited the Kames passage for the view that the absence of a 'common law' remedy was at least 'important', and continued:¹⁴⁷

'I do not know that it is absolutely essential to the success of an action for recompense that the pursuer should not have, and should never have had, any possibility of raising an action under the ordinary law, but in my opinion it would at least require special and strong circumstances to justify an action of recompense where there was, or had been, an alternative remedy open to the pursuer. [...] In the present case the common law did afford relief, but the pursuers did not avail themselves of it, and in the circumstances of this case that is, in my opinion, enough to prevent their relying on the equitable remedy.'

Many consider this case to be the modern root of subsidiarity.¹⁴⁸ The absence of the vocabulary from the decision suggests that this is incorrect.

For the same reason,¹⁴⁹ also irrelevant to this study is *Lawrence Building Co Ltd v Lanarkshire CC*.¹⁵⁰ Sewers vested in a council after work on them was completed by the pursuers, in line with a practice already judicially approved.¹⁵¹ But, departing from that practice, payment was never made. The pursuers claimed in implied contract and, alternatively, in recompense. The Lord President (Emslie) addressed the requirement in recompense that 'in all the circumstances it would be equitable for the pursuers to be reimbursed'.¹⁵² It was argued that if the defender was obliged to construct the sewers, the pursuer should have followed the pre-approved practice, and petitioned

¹⁴⁷ *ibid*, 259-260.

¹⁴⁸ WDH Sellar, 'Obligations' in R Black (ed), *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol XV (Lexis Nexis 1995) [68]; HL MacQueen and WDH Sellar, 'Unjust Enrichment in Scots Law' in EJM Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Duncker & Humblot 1995) 312-314; J Blackie, 'Enrichment, Wrongs and Invasion of Rights in Scots Law' [1997] *Acta Juridica* 284, 289-290; N Whitty, 'Transco Plc v Glasgow City Council: Developing Enrichment Law after Shilliday' (2006) 10 *Edinburgh L Rev* 113, 122-123.

¹⁴⁹ And *pace*, eg, Sellar (n 148) [69]; MacQueen and Sellar (n 148) 313-314; Whitty (n 148) 122-123 and note 61.

¹⁵⁰ *Lawrence, Inner House* (n 131); upholding 1978 SC 30 (OH).

¹⁵¹ See *T Docherty Ltd v Monifieth Town Council* 1970 SC 200 (IH) 206-207 (the Lord President [Clyde]). In that case, a petition for declarator was presented *ab initio*.

¹⁵² *Lawrence, Inner House* (n 131) 42, 44-45.

ab initio for implement or declarator of that obligation. His Lordship forbore to decide *Varney*'s correctness, and distinguished the defender's duty in that case from the council's in this: 'it is by no means clear that there would have been a duty on the defenders to construct the sewers at the stage when the [...] petition was presented in *Docherty*'s case¹⁵³ or that it would have been either reasonable or practicable for the pursuers to have the question of liability for the cost of the sewers determined before the work of construction began'.¹⁵⁴ Lord Cameron agreed with this in substance, and Lord Grieve agreed with both other opinions. The case is not about subsidiarity.

Nor¹⁵⁵ is *McGraddie v McGraddie*.¹⁵⁶ There, the Inner House made observations on the basis that the second defender was enriched without legal ground at the pursuer's expense.¹⁵⁷

'As for *Varney* [...], there it was held that a pursuer who has, say, a statutory or contractual remedy against a defender, must use that remedy rather than resorting to an equitable remedy such as restitution or recompense based on unjustified enrichment. But in the present case, so far as the second defender is concerned, the pursuer would have had no remedy against her other than an equitable one. We are not therefore persuaded that the *ratio* in *Varney* [...] would have prevented the pursuer from enforcing that equitable remedy against the second defender.'

The reference to contractual remedies puzzles: *Varney* says nothing about them. We cannot know whether the court was exposed to the language of subsidiarity, yet omitted it. Nevertheless, and significantly, it is absent from this recent high-level discussion of the interaction of unjustified enrichment claims with other routes to redress provided by law.

¹⁵³ *Docherty* (n 151).

¹⁵⁴ *Lawrence*, *Inner House* (n 131) 44.

¹⁵⁵ *Pace R Evans-Jones, Unjustified Enrichment, II: Enrichment Acquired in Any Other Manner* (W Green 2013) [7.10].

¹⁵⁶ *McGraddie v McGraddie* [2012] CSIH 23, 2012 GWD 15-310; overruled on other grounds [2013] UKSC 58, 2014 SC (UKSC) 12; upholding [2010] CSOH 60, 2010 GWD 21-404.

¹⁵⁷ *ibid*, [54] (Lady Paton, Lord Bonomy and Lord Malcolm).

In summary, the subsidiarity of unjustified enrichment is gaining ground in Scots cases. The Outer House has embraced the language to explain the rules discussed above, which exist to preserve autonomy and order in the legal system. But it remains arguable in the Inner House that the doctrine affirmed in *Varney* and subsequent cases is simply not about subsidiarity.

B. Scots scholarship

Numerous Scottish scholarly endorsements, to varying extents, of the subsidiarity of unjustified enrichment, are addressed in this study. As in English and French scholarship, a common reason for this is a perceived need to prevent unjustified enrichment's upsetting solutions provided by other legal rules.¹⁵⁸

It has been suggested that 'in 1974 the subsidiarity rule was plucked from a little known and hitherto uninfluential passage in Kames's *Principles of Equity* and affirmed as part of Scots law in the *Varney* case'.¹⁵⁹ We must absolve Lord Kames of responsibility for subsidiarity at once. Not only does he not use the language, his account of the application of the maxim '[n]emo debet locupletari aliena jactura' to the case of the bona fide improver-possessor of land cannot bear the weight placed upon it.¹⁶⁰ Kames simply stated that the 'common law affords no relief' to the pursuer in the form of a *vindicatio*. He seems not even to have meant that the lack of a 'legal' remedy for the bona fide possessor was a factor which favoured the application of his maxim.¹⁶¹ Rather, since what Kames saw as legal remedies are useless, equity – unjustified enrichment – had to step in.

Their willingness to explain too many cases in such terms aside, modern Scottish writers are generally cautious when studying subsidiarity, perhaps due to strong engagement with comparative material. This is seen in very early discussion of

¹⁵⁸ EM Clive, *Draft Rules on Unjustified Enrichment and Commentary – Appendix to Scottish Law Commission Discussion Paper No 99* (HMSO Scot 1994) 85-87; Whitty (n 148) 126; Evans-Jones (n 155) [3.39], [7.05].

¹⁵⁹ Whitty (n 148) 123.

¹⁶⁰ Lord Kames, *Principles of Equity* [by] Henry Home, Lord Kames, vol I (M Lobban ed, 3rd edn, (1778) Liberty Fund 2014) 141-142.

¹⁶¹ It is respectfully submitted that Lord Fraser went too far even to suggest in *Varney* (n 128) 260, that '[w]hile Lord Kames did not say that the absence of a remedy under the common law was essential, he evidently regarded it as important'.

subsidiarity in Scotland by native scholars.¹⁶² In 1993,¹⁶³ the Scottish Law Commission explained that subsidiarity did not then extend beyond actions for recompense, noted similarities with the French position, and remained studiously neutral on subsidiarity in principle.¹⁶⁴

Although, in highly regarded work,¹⁶⁵ at least one earlier author was more enthusiastic about subsidiarity,¹⁶⁶ a circumspect approach to the need for subsidiarity across enrichment law *generally* is evident in other commentary.¹⁶⁷ Even ready acceptance of the concept and language was accompanied in the 1990s by talk of ‘damage’, and ‘an urgent need for further clarification’.¹⁶⁸

The 2000s have seen stronger critical and comparative notes, and even an outright rejection of subsidiarity.¹⁶⁹ Hector MacQueen’s important 2009 work is examined in chapter 6.¹⁷⁰ His earlier survey,¹⁷¹ drawing, especially, on Louisiana and Québec law, concludes:¹⁷²

¹⁶² But see, eg, W de Vos, ‘Liability Arising from Unjustified Enrichment in the Law of the Union of South Africa, II’ [1960] JR 226, 252, advocating a gap-filling, ‘subsidiary’ general enrichment action in South African law. This piece was probably widely read, and may have inspired others. It was (i) praised as ‘an admirable survey [...] with particular relevance for Scots law’ by TB Smith, *A Short Commentary on the Law of Scotland* (W Green 1962) 624 and note 7; (ii) cited by, eg, HL MacQueen, ‘Unjustified Enrichment and Breach of Contract’ [1994] JR 137, 155 and note 78; K Reid, ‘Unjustified Enrichment and Property Law’ [1994] JR 167, 186 and note 85; and (iii) appears in the further reading list of Lord Rodger’s enrichment chapter in WA Wilson and A Forte (eds), *Gloag & Henderson: The Law of Scotland* (10th edn, W Green 1995) ch 29. (de Vos’ switch in favour of a non-subsidiary general action is explained in English by D Visser, *Unjustified Enrichment* (Juta 2008) 58-59.)

¹⁶³ And beaten marginally to the use of the word (in a one-liner) by WJ Stewart, *The Law of Restitution in Scotland* (W Green 1992) [8.19].

¹⁶⁴ Scottish Law Commission, *Recovery of Benefits Conferred Under Error of Law*, vol I (Scot Law Com DP no 95, 1993) [3.107]-[3.108] and note 2; citing, for French law, D Friedmann and N Cohen, ‘Payment of Another’s Debt’ in P Schlechtriem (ed), *International Encyclopedia of Comparative Law*, vol X (Mohr / Siebeck / Nijhoff 1991) [84].

¹⁶⁵ See Burrows, *Restitution* (n 32) 8: ‘worthy of close attention [...] is [Clive’s] formidable work’.

¹⁶⁶ Discussed, in particular, in chapter 4: Clive (n 158) rule 11 and commentary, 86-88 and note 72; citing, eg, F Chabas (ed), *Leçons de droit civil de H, L et J Mazeaud*, vol II/1 (8th edn, Montchrestien 1991) no 706, and drawing on the French position.

¹⁶⁷ See N Whitty, ‘Indirect Enrichment in Scots Law, I’ [1994] JR 200, 217.

¹⁶⁸ MacQueen and Sellar (n 148) 314. See similarly Sellar (n 148) [71]: ‘A review of the subject as a whole is urgently required’.

¹⁶⁹ By Martin Hogg in *Obligations* (2nd edn, Avizandum 2006) [4.111]-[4.121].

¹⁷⁰ HL MacQueen, ‘Unjustified Enrichment, Subsidiarity and Contract’ in V Palmer and E Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (EUP 2009).

¹⁷¹ HL MacQueen, ‘Unjustified Enrichment in Mixed Legal Systems’ [2005] RLR 21, 24-27 and notes 18-27; citing, eg, B Nicholas, ‘Unjustified Enrichment in Civil Law and Louisiana Law, Parts I and II’ (1961) 36 Tulane L Rev 605; (1962) 37 Tulane L Rev 49; Smith, ‘Property, Subsidiarity and Unjust Enrichment’ (n 13); and cases such as *Coastal Environment Specialists Inc v Chem-Lig International* (2001) 818 So 2d 12 (La CA 1st Cir).

¹⁷² MacQueen, ‘Unjustified Enrichment in Mixed Legal Systems’ (n 171) 31.

‘It is significant [...] that there is controversy as to the need for (or scope of) this subsidiarity, even if one’s ambition is to fence in enrichment liability within the overall structure of the law. Can the limitations imposed by subsidiarity be worked out better, and more in accord with coherent legal principle, by way of analysis of when enrichments are unjustified?’

And later:¹⁷³

‘A general test of subsidiarity seems to pose more questions than answers: how far the exploration of alternative possible remedies must go, and whether or not they must give rise to successful claims.’

Also worthy of mention is Niall Whitty’s long 2006 note on the *Transco* case. He cautions against the judicial abrogation of subsidiarity, because ‘judicial discretion dissolves the common law’. Instead, he advocates ‘a minimalist solution’, limiting subsidiarity ‘to the particular category of causes of action involved in the *Varney* and *Transco* cases, namely imposed enrichment arising from performance of another’s obligations’.¹⁷⁴ Yet he immediately asks: ‘why stop there?’¹⁷⁵ We realise that, subject to an exception, considered in chapter 6, Whitty would probably abolish subsidiarity if his view of the judicial role allowed. Like his colleagues, Whitty also uses comparative material, and agrees with:¹⁷⁶

‘[A] widespread view among comparatists that “the rule of subsidiarity is no more than a particular application of the policy of avoiding a fraud on the law and should be interpreted in that light” [...] [I]t is a “control device” restraining the inherent expansiveness of enrichment law so that it does not disrupt or undermine the operation of other equally useful branches of law.’

¹⁷³ *ibid*, 33.

¹⁷⁴ Whitty (n 148) 125-126.

¹⁷⁵ *ibid*, 126.

¹⁷⁶ *ibid*, 126 and n 80; citing Nicholas, ‘Modern Developments’ (n 20) 93.

Whitty's minimalist view is now reflected in the leading short account of Scots enrichment law.¹⁷⁷ These contributions may form a bulwark against further expansion of subsidiarity, should the Inner House of the Court of Session ever be called upon to decide the correctness of the approach taken in *Transco* and *Courtney's* case.¹⁷⁸ But the work of Robin Evans-Jones, analysed in chapters 5, 6, 7, and 9, favours subsidiarity in explaining unjustified enrichment's relations with contract law,¹⁷⁹ and the interaction with each other of different kinds of unjustified enrichment claim.¹⁸⁰ There is still everything to play for.

CONCLUSION

In England, subsidiarity is absent from the law of unjust enrichment. But some writers endorse it fairly unquestioningly. In France, subsidiarity is the firm orthodoxy, though some now contend harder to reduce its hold over *enrichissement injustifié*. In Scotland, subsidiarity's purchase in enrichment law is slight. Though widespread in scholarship, it has not been received blindly. Across jurisdictions, the shared reason for accepting subsidiarity is the power and generality of unjust enrichment.

¹⁷⁷ *Gloag & Henderson: The Law of Scotland* (12th edn, W Green 2007) [25.19] and note 137; (13th edn, W Green, 2012) [24.19] and note 139; (14th edn, W Green 2017) [24.19] and note 143; the latter adding that *Courtney's Executors* (n 133), '(a transfer case) is a misapplication of the subsidiarity rule'. Subsidiarity and the performance of another's obligation is discussed from a different angle in chapters 4 and 6.

¹⁷⁸ See also, talking partly of *Courtney's Executors* (n 133), and partly more generally: Law Society of Scotland, *The Scottish Law Commission's Consultation on the Tenth Programme of Law Reform: Consultation Response* (2017) 9-11: 'The common law remedy should be restored and clarified now by providing that the doctrine of subsidiarity shall not apply to unjustified enrichment'.

¹⁷⁹ Eg, in R Evans-Jones, *Unjustified Enrichment, I: Enrichment by Deliberate Conferral: Conductio* (W Green 2003) [1.99].

¹⁸⁰ Evans-Jones (n 155) [3.09]-[3.10], [3.37]-[3.39].

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CHAPTER 4

UNJUST ENRICHMENT, SUBSIDIARITY, AND STATUTE

Previous chapters in this study provide background on the law of unjust enrichment, introduce a definition and principles of subsidiarity, and sketch the history of, and reasons for, subsidiarity in the law and scholarship on unjust enrichment. This chapter is the first to put those general chapters to use. Its first part surveys material in the law and literature about unjust enrichment's subsidiarity in situations where its operation is somehow precluded by statute. In the second part of this chapter, this material is tested against the theory of subsidiarity developed in chapter 2 of this study. It will be seen that none of the law and scholarship can correctly be characterised as entailing unjust enrichment's subsidiarity to statute. The third part of this chapter re-analyses the sources, in order better to explain unjust enrichment's relations with statute.

I. THE CLAIMS

This part of the chapter presents claims about unjust enrichment's subsidiarity to statute. They are found in French and Scots law and scholarship.

A. England

Nothing in English law suggests that unjust enrichment is there subsidiary to statutory regimes. The scholarship is nearly as sparse. Lionel Smith appears to accept that, in principle, enrichment can be subsidiary to statute. However, his conclusion is limited: '[t]he common law does not know "subsidiarity" by that name, but elements of that relationship appear to be embedded in the law'.¹ This cannot be fairly taken as a claim that unjust enrichment is subsidiary to statute.

¹ L Smith, 'Property, Subsidiarity and Unjust Enrichment' in D Johnston and R Zimmermann (eds), *Unjustified enrichment: key issues in comparative perspective* (CUP 2002) 613-614, 623.

B. France

As shown in chapter 3, article 1303-3 of the *Code civil*, and the *Cour de cassation*'s formulae from which it derives, are claims or rules about the subsidiarity of the *action de in rem verso* in France. Though they do not themselves use the language of subsidiarity, many *other* sources, referred to earlier, do put it to the now-codified rules. Article 1303-3 encompasses open or legally barred *statutory* actions. Through its 'obstacle of law' bar, found in earlier cases, it further catches statutory regimes which do not themselves confer rights of action, but are inconsistent with unjustified enrichment actions. Statute was specifically added to the original *Clayette / Briauhant* formula by the *Cour de cassation* in 1951,² before this was linguistically shortened but legally broadened twenty years later.³ Further specific claims that unjustified enrichment is subsidiary to statute exist. Four examples from the cases are addressed, before brief mention of some relevant scholarship.

First, take unjustified enrichment's supposed subsidiarity to delict in French law. Claims that this is true double as claims about unjustified enrichment's subsidiarity to statute. French law's general principle of delictual liability is found in the *Code civil*, article 1240 (formerly the famous article 1382). And as will be shown in more detail in chapter 7, many cases explain the interaction of unjustified enrichment and delict in terms of subsidiarity,⁴ with both open and barred delictual actions discounting recourse to unjustified enrichment. The same approach has been taken with other statutory regimes.

² '[L]'action *de in rem verso* ne doit être admise que dans les cas où le patrimoine d'une personne se trouvant enrichi au détriment de celui d'une autre, celle-ci ne jouirait, pour obtenir ce qui lui est dû, d'aucune action naissant d'un contrat, quasi-contrat, délit, quasi-délit ou de la loi [...]': Civ, 29 January 1951, *Bull civ I*, n° 34, also mentioning the 'caractère subsidiaire' of the action. See, previously, but introducing statute differently, CA Paris, 21 April 1937; [1937] *Gaz Pal*, II, 426: the *action de in rem verso* 'est subsidiaire et ne peut être exercée lorsque le demandeur peut obtenir satisfaction par une autre action naissant d'un contrat, d'un quasi-contrat ou d'un délit, ou a omis d'exercer, pour la sauvegarde de ses droits, une autre action que la loi mettait à sa disposition'.

³ In part one of the *Troisième Chambre civile*'s well known formula. See Civ 3e, 29 April 1971, pourvoi n° 70-10415, *Bull civ III*, n° 277; [1970-1971] *Rapport annuel C cass* 37; [1971] *Gaz Pal*, II, 554; [1971] *RTD Civ* 842, observations by Y Loussouarn: '[1.] [L]'action fondée sur l'enrichissement sans cause ne peut être admise qu'à défaut de toute autre action ouverte au demandeur; [2.] qu'elle ne peut l'être, notamment, pour suppléer à une autre action que le demandeur ne peut tenter par suite d'une prescription, d'une déchéance ou forclusion ou par l'effet de l'autorité de la chose jugée ou parce qu'il ne peut apporter les preuves qu'elle exige ou par suite de tout autre obstacle de droit [...].'

⁴ In advance, see, for example, Civ 1re, 20 March 2014, pourvoi n° 12-28318.

Secondly, let us examine a case showing the use of subsidiarity in relation to unjustified enrichment's interaction with an *open*, that is, *unbarred*, statutory recourse, which a claimant could have used, but did not. In a 1960s decision, statute obliged a mining company to pay subscriptions into a scheme to finance grants to miners with families. But a miners' union paid four years' worth of those grants directly to miners, instead. The union then sued the company for unjustified enrichment in respect of this outlay. It failed. The statute obliged the company, not to make the actual grants themselves, but only to pay its subscriptions. And it seems that the union could have forced the company to do this, because the *Cour de cassation* approved the court below for holding that 'the *action de in rem verso* has a subsidiary character, and is set aside when the party impoverished has the advantage of another route to redress which it has neglected to use'.⁵

Thirdly comes an example of subsidiarity's use in relation to unjustified enrichment's interaction with a *barred* statutory recourse. In a case from the 1970s, a woman worked for twenty-one years on her parents' farm without a formal salary. She left to get married, and so became ineligible for a deferred wage under a special statutory regime. Knowing this, she claimed in unjustified enrichment. The *Tribunal de grande instance* of Dieppe denied that action:⁶

'Considering that the *action de in rem verso* is a subsidiary route allowing a person who has no other action to vindicate its rights, but not to supplement another action refused by the legislator [...]; that the claimant insists herself that she falls within [a statutory] case of exclusion; [...] considering that she cannot [therefore] supplement the action so refused by the *action de in rem verso* [...].'

⁵ Civ 2e, 1 December 1966, *Bull civ* II, n° 943: 'l'action *de in rem verso* a un caractère subsidiaire et se trouve écartée lorsque celui qui s'est appauvri a la disposition d'une autre voie de droit dont il a négligé d'user'. For another more recent example of the exclusion of the *action de in rem verso* due to the availability of a statutory action (based on the *Code civil*, art 555), see CA Colmar 22 February 2018 RG n° 126/2018.

⁶ TGI Dieppe, 31 March 1977; [1977] JCP G, II, 18702: 'Attendu que l'action *de in rem verso* est une voie subsidiaire permettant à qui ne dispose d'aucune autre action de faire valoir son droit, mais non de suppléer une action que le législateur refuse [...]; que la demanderesse insiste elle-même sur le fait qu'elle entre dans ce cas [légal d'exclusion dans le régime du contrat de salaire différé]; [...] Attendu qu'elle ne peut suppléer l'action ainsi refusée par l'action *de in rem verso* [...].'

Fourthly, we turn to a case on commercial facts from the 1990s. It involved a statutory regime which provided for no recourse *at all* in respect of the benefit conferred. Rather, the statute was simply inconsistent with an unjustified enrichment action. The *Cour de cassation*'s judgment is left to speak for itself here:⁷

‘Considering that, apart from exceptions provided for by [statute], directors can receive from the[ir] company no remuneration, whether permanent or not; that, therefore, a director cannot base a claim for compensation for work done in the service of the company on the latter's unjustified enrichment, since the *action de in rem verso* cannot be used to supplement another action barred by an obstacle of law; given that, in affirming the claim for compensation made by Mme X, the court of appeal held that recourse to unjustified enrichment was legitimate in principle; given that, in so holding, whereas it appears from the judgment [below] that Mme X was fulfilling the functions of a company director when she provided the services in respect of which she pursues payment, the court of appeal has violated [the relevant statutory provisions] [...].’

A later decision dealt with an identical claim more explicitly in terms of subsidiarity: ‘a director in post cannot receive any remuneration other than that authorised [by statute], with the result that an action in unjustified enrichment, which has a subsidiary character, is barred in this case by an obstacle of law’.⁸

⁷ Com, 16 May 1995, pourvoi n° 93-14709, *Bull civ IV*, n° 149; [1996] *Rev sociétés* 95, observations by C Gerschel; [1996] *RTD Civ* 160, observations by J Mestre: ‘Attendu que sauf exceptions prévues par la loi [...], les administrateurs ne peuvent recevoir de la société aucune rémunération, permanente ou non; que dès lors, un administrateur ne peut fonder une demande d'indemnité pour le travail accompli au service de la société sur l'enrichissement sans cause de celle-ci, l'action de in rem verso ne pouvant être introduite pour suppléer à une autre action qui se heurte à un obstacle de droit; Attendu que pour accueillir la demande en indemnisation formée par Mme X, la cour d'appel a retenu que le principe du recours à l'enrichissement sans cause était légitime; Attendu qu'en statuant ainsi, alors qu'il résulte des énonciations de l'arrêt que Mme X exerçait des fonctions d'administrateur de la société à l'époque où elle a fourni à celle-ci les prestations dont elle poursuit le paiement, la cour d'appel a violé les textes [pertinents] [...].’

⁸ Soc, 5 November 2009, pourvoi n° 08-43177; [2010] *Bull Joly Soc* 462, observations by P Le Canu: ‘un administrateur en fonction ne peut percevoir aucune autre rémunération que celles autorisées par [la loi], en sorte qu'une action pour enrichissement sans cause, qui présente un caractère subsidiaire, se heurte en ce cas à un obstacle de droit’.

A good deal of earlier scholarship also contains claims that unjustified enrichment is subsidiary to statute. The earliest that it has been possible to track down is from 1852.⁹ In a noted 1922 article, André Rouast criticised the *Cour de cassation*'s *Clayette-Briauhan*t formulation of subsidiarity, as he saw it,¹⁰ because it omitted statutory actions – '*actions nées de la loi*'. He then proposed a new basic formula and developed the distinction between obstacles of law and fact.¹¹ In 1926, in what remains one of the lengthiest treatments of unjustified enrichment in French law, Joseph Bonnetcase largely endorsed Rouast's view of subsidiarity, and specifically affirmed that it extended to statute.¹² Similar specific claims exist in later writing.¹³ But they are more difficult to find, following the courts' firm commitment to analysing subsidiarity based on open and barred enrichment actions, coupled with the distinction between obstacles of law and fact.¹⁴ This is perhaps because unjustified enrichment's subsidiarity to statute tended from then onwards to be collapsed into, or encompassed by, the law-fact distinction, or other models based on different factual situations in which subsidiarity will operate.¹⁵ For this reason, French scholarship on enrichment, subsidiarity and statute, is often of historical and scholarly interest only. It is not discussed further in this part of the chapter.

C. Scotland

Unjustified enrichment's relations with statute in Scots law have been analysed using subsidiarity. Take first *Transco Plc v Glasgow City Council*,¹⁶ about repairs to a bridge carrying gas pipes. Overall, it is an imposed enrichment case, rationalising the denial

⁹ A Berliner, *De l'action de in rem verso* (Silberman 1852) 31-32, giving the example of *Code civil*, art 548.

¹⁰ It was argued in chapter 3 that the *arrêts Clayette and Briauhan*t were not strictly about subsidiarity at all. See Civ, 12 May 1914; [1914] D Chron 56; [1914] Pandectes, Bull somm, I, 86; [1918] S, I, 41, noted by E Naquet; Civ, 2 March 1915; [1915] S, Bull somm, I, 20; [1920] DP, I, 102 (first case).

¹¹ A Rouast, 'L'enrichissement sans cause et la jurisprudence civile' [1922] RTD Civ 35, 83-84.

¹² J Bonnetcase, *Supplément au Traité théorique et pratique de droit civil par G Baudry-Lacantinerie et L-J Barde*, vol III (Sirey 1926) nos 146, 149-150, 152.

¹³ P Drakidis, 'La "subsidiarité", caractère spécifique et international de l'action d'enrichissement sans cause' [1961] RTD Civ 577, 613: first proposition *a contrario*.

¹⁴ See, most clearly in the *Cour de cassation*, Civ 3e, 29 April 1971 (n 3).

¹⁵ For a clear modern example of this, see F Chabas (ed), *Leçons de droit civil de H, L et J Mazeaud*, vol II/1 (9th edn, Montchrestien 1998) no 706-710, esp 709. See also, eg, B Starck, H Roland and L Boyer, *Droit civil: Les obligations*, vol II (6th edn, Litec 1998) nos 2207-2210; F Terré, P Simler and Y Lequette, *Droit civil: Les obligations* (11th edn, Dalloz 2013) no 1073-1; (12th edn, with F Chénéde, Dalloz 2018) nos 1309-1314; AM Romani, 'Enrichissement sans cause', *Rép civ Dalloz* (2017) nos 278-358.

¹⁶ [2005] CSOH 76, 2005 SLT 958.

of an unjustified enrichment claim for the remedy of recompense, when another (statutory) route to redress was concurrently available to the pursuer at the time of the enrichment claim, as an example of unjustified enrichment's subsidiarity. The 'determining issue' was that the pursuers had not 'averred strong and special circumstances to take themselves out of the general rule of the subsidiarity of the remedy of recompense'.¹⁷

Take next *Courtney's Executors v Campbell*,¹⁸ about a late claim for financial redress under the Family Law (Scotland) Act 2006 for financial redress. Overall, it is an enrichment by transfer case, rationalising the denial of unjustified enrichment claims in general where another statutory route to redress was barred at the time of an enrichment claim, as an example of unjustified enrichment's subsidiarity: absent 'special and strong circumstances', unjustified enrichment claims are 'available only when no other legal remedy is or has been available'.¹⁹ The effect of these authorities is that, absent special and strong circumstances, *all* unjustified enrichment claims are *subsidiary* to statutory routes of redress which either are concurrently available to a pursuer, or were available to a pursuer, but are now barred.²⁰

¹⁷ *ibid*, [18] (Lord Hodge).

¹⁸ [2016] CSOH 136, 2017 SCLR 387.

¹⁹ *ibid*, [52]-[54], [60], [65].

²⁰ In particular, see *ibid*, esp [53], [58], [60]. Here, Lord Beckett said that the subsidiarity 'principle arises wherever an equitable remedy is sought on the ground of unjustified enrichment'; that authority did 'not support the view that the pursuers have no problem arising from the subsidiarity principle on the basis that the statutory remedy is no longer available'; and that 'as it ha[d] been presented to [him], the subsidiarity principle applies not just in cases where recompense is the remedy sought but in all cases of unjustified enrichment'.

Scots enrichment scholarship has given less attention to unjustified enrichment's subsidiarity to statute than it has to the issue of subsidiarity in other contexts examined in this study. But rule eleven of Eric Clive's *Draft Rules*,²¹ headed 'Bars to Proceedings', provides:

'(1)(a) An action for unjustified enrichment cannot be brought under these rules if there is, or was,
(i) a special statutory or contractual procedure for dealing with the situation giving rise to the enrichment or
(ii) another legal remedy for the enrichment
and if the claimant could reasonably have been expected to use that procedure or remedy.'

We are interested in sub-rule (1)(a)'s prohibition on an unjustified enrichment claim 'if there is, or was (i) a special statutory procedure [...] for dealing with the situation giving rise to the enrichment [...] and if the claimant could reasonably have been expected to use that procedure [...]'. It seems that, for Clive, this was a rule of subsidiarity. This is suggested by remarks and citations justifying rule eleven with policy.²² Clive says that this was 'the existing Scottish law in relation to recompense', and that France's *action de in rem verso* is 'subsidiary'. He also cites a translation of article 2042 of the Italian Civil Code headed 'Ancillary character of the action' in unjustified enrichment.²³ The original is headed '*Carattere sussidiario dell'azione*'.

²¹ EM Clive, *Draft Rules on Unjustified Enrichment and Commentary – Appendix to Scottish Law Commission Discussion Paper No 99* (HMSO Scot 1994).

²² *ibid*, 85-86: special regimes and remedies must not be 'bypassed by resort to the general law on unjustified enrichment'; it is necessary 'to prevent a flood of attempts to re-open settled transactions'; and 'unjustified enrichment is designed to deal with unforeseen situations', not 'provide an alternative remedy for an enrichment situation which is already regulated by a statute or a contract or an established rule of the common law'.

²³ *ibid*, 86 and notes 71-73; citing F Chabas (ed), *Leçons de droit civil de H, L et J Mazeaud*, vol II/1 (8th edn, Montchrestien 1991) no 706, discussing subsidiarity; M Beltramo, GE Longo and JH Merryman (trs), *The Italian Civil Code* (Oceana 1969). But the Scottish cases cited by Clive do not support subsidiarity because they do not mention it. See *Varney (Scotland) Ltd v Lanark Burgh Council* 1974 SC 245 (IH); *City of Glasgow DC v Morrison McChlery & Co* 1985 SC 52 (IH).

There appear to be no other relevant, and extensive, positive claims in Scots enrichment scholarship. What of negative claims? Prior to *Courtney's case*, Hector MacQueen made the following observations:²⁴

'The policy behind the [subsidiarity] requirement [ie keeping the remedy of recompense within its proper bounds] can be fulfilled by observing the other requirements of enrichment law itself: for example, that enrichments which have a legal basis, having been gained through contract or gift, are irrecoverable; or by working through the rules relating to recoverable enrichments arising from transfers, impositions and takings, which will generally ensure that enrichment is kept within bounds. [...] The Family Law (Scotland) Act 2006 does not explicitly prevent the common law from applying to any of the situations within its purview; nor, it is submitted, should enrichment claims be seen as subsidiary to, or excluded by, the existence of statutory ones.'

MacQueen notes that subsidiarity is often unnecessary, given the requirement, internal to enrichment law, that an enrichment be received without legal basis. But, turning to the relationship between enrichment and statute, MacQueen seems to leave the redundancy argument behind. Over it, he prefers the slightly different tack of reliance on the absence of any express exclusion of unjustified enrichment claims in the 2006 Act, and a straightforward submission that enrichment claims should not be subsidiary to statutory ones. That submission was rejected in *Courtney's case*.²⁵ The extra power which the redundancy argument needs is provided below.

²⁴ HL MacQueen, 'Unjustified Enrichment and Family Law' [2010] U Edinburgh L Sch Working Paper 01, 4.

²⁵ *Courtney's Executors* (n 18) [34], [60] (Lord Beckett): 'Whilst it is true, as counsel for the pursuers observed, that the 2006 Act does not explicitly exclude an action based on unjustified enrichment being raised after the period specified in section 28(8), and I note Professor M[a]cQueen's view on the matter, I am not persuaded that it follows that an equitable remedy will always remain open following the expiry of the 12 month period [instituted by section 28]. Parliament, and particularly the parliamentary draftsmen on whom it relies, are expected to be aware of the common law. If, as it has been presented to me in this case, the subsidiarity principle applies not just in cases where recompense is the remedy sought but in all cases of unjustified enrichment, then parliament would be expected to know that.'

II. ANALYSIS OF THE CLAIMS

In this second part of the chapter, the claims set out above are analysed. The framework for discussion is the principles of subsidiarity developed in chapter 2 of this study. The background is the conditional nature of subsidiarity, also developed in chapter 2, and both the law of unjust enrichment, and the general question of its subsidiarity, surveyed in chapters 1 and 3.

A. Existence

Once in place as an operative rule or principle, subsidiarity is not concerned to determine whether a given entity to which it applies actually exists. To be a rule of subsidiarity, it would seem necessary for a rule to create, maintain, or put an end to, a relationship of subsidiarity between entities. For a rule to destroy one or more of the entities, the interaction of which it is supposed to manage, might be thought to prevent it from carrying out these functions in relation to that entity. It would also seem to deal with a question of overlap in a less than conditional manner. And as argued in chapter 2, subsidiarity is an inherently *conditional* idea. Once an entity does not exist, there is no way for it eventually to become competent. Here, the relevant entities are, on one side, statutory regimes and the routes to redress that they provide, modify, or exclude, and on the other, the law of unjust enrichment and unjust enrichment claims. The above French and Scots accounts infringe the instant principle.

The general claim found in French law (now in the *Code civil*, art 1303-3) and scholarship that *enrichissement injustifié* is subsidiary to open and legally barred statutory claims, or inconsistent statutory regimes which do not yield claims, fails. Focusing particularly on the *Code civil*, the rule clearly makes the enrichment action disappear (the claimant ‘has no action’).²⁶ So it is not a rule of subsidiarity. The same reasoning applies to the more specific claims, found in particular cases.

²⁶ The partial exception to the obstacle of law bar, for *negotiorum gestio* in the *Code civil*, art 1303-5, makes no difference to the basic principle here. This issue is discussed further in chapter 9.

The French courts freely use the language of subsidiarity to describe unjustified enrichment's relations with statute. Enrichment claims must be 'set aside' in the face of open statutory routes to redress.²⁷ And, in a formula which covers both barred statutory actions and straightforwardly inconsistent regimes, the *Cour de cassation* has held that unjustified enrichment, 'cannot be used to supplement another action barred by an obstacle of law'.²⁸ It seems that the rules endorsed by the courts determine the existence of any unjustified enrichment claims when a statute relevantly exists, too. They are not about subsidiarity.

Turning to Scots law, it is clear from the cases that subsidiarity is a rule 'excluding' unjustified enrichment if its operation would be inconsistent with a statute.²⁹ If it would be, then, absent special and strong circumstances, unjustified enrichment will not 'remain open', or, procedurally, 'be relevant'.³⁰ Since this rule determines the existence of unjustified enrichment on a given set of facts, it cannot be one of subsidiarity. The same objection applies to Clive's rule 11(1)(a)(i) – which is a rule of subsidiarity, and one of his 'Bars to proceedings'.

B. Plurality

A relationship of subsidiarity positively requires the existence of at least two entities, or groups of entities. Without a plurality of entities, no relationship would be possible at all in a given context, and whatever authority existed in that context would lie unconditionally with the only relevantly extant entity. The above law and scholarship do not satisfy this principle.

In French law, both under the *Code civil*, article 1303-3, and in the cases, the existence of open and barred statutory actions, and inconsistent statutory regimes, clearly means that there can be no action in *enrichissement injustifié*. One thing cannot be in a relationship with another thing, if one of those things does not exist. An enrichment

²⁷ Civ 2e, 1 December 1966 (n 5).

²⁸ Com, 16 May 1995 (n 7).

²⁹ *Transco* (n 16) [16] (Lord Hodge), referring to 'the subsidiarity of the remedy of recompense' and 'the general rule excluding recompense if the pursuer had failed to pursue another remedy either at common law or under statute'.

³⁰ *Courtney's Executors* (n 18) [60], [66].

claim cannot be subsidiary to a statutory regime (whether or not it confers any right to redress) if it does not exist.

To like effect are the Scots cases, and Clive's rule. If applied, then in the face of an open, barred, or inconsistent statutory route to redress, unjustified enrichment, or an unjustified enrichment claim, will never join statutory rules to form part of a relevant plurality of entities in a relationship of subsidiarity.

C. Overlap

For a rule of subsidiarity to be relevant in any context, at least two entities in that context must be capable of overlapping if unrestrained. Otherwise, there would be nothing for a conditional rule of subsidiarity to do. The above French and Scots law and scholarship does not satisfy this principle.

This is a short point. It makes no difference whether the above analyses canvassed here address it. None which favours enrichment's subsidiarity to statute relevantly admits that the former can coexist with the latter. So none admits that they might concur. If none admits that, then none leaves any role for subsidiarity. Accounts which leave no role for subsidiarity cannot sensibly be said to be about subsidiarity.

D. Meta-authority

For a rule of subsidiarity definitively to resolve questions of allocation and overlap, it must bind the relevant entities by constituting an independent, higher authority in relation to them. If this were not so, and the relevant entities could manage their relations without an independent, higher, organising rule (as, for example, would be the case if one of them were sovereign and could dictate any relevant interactions), there would be no need for subsidiarity. This is subsidiarity as meta-authority. A rule of subsidiarity is what dictates whether the entities to which it applies have competence or authority, however they might behave if unrestrained. And the condition, howsoever framed, on which allocation takes place, goes to the general essence of subsidiarity. The above French and Scots law and scholarship do not satisfy the instant principle.

The rule in article 1303-3 of the *Code civil* is not a meta-authority in relation to the *action en enrichissement injustifié* or other statutes. It is placed in the chapter of the *Code* on that enrichment action, of which it is an 'inherent condition'.³¹ This is clearly reflected in the more specific reasoning addressed above, also.³² So the rule is not sourced independently of the *action de in rem verso*, one of the entities to which it is supposed to apply. And it does not actually govern any potential statutory regime which might come under its formula, either. It works by making the *action en enrichissement injustifié* disappear in the face of statutes. The statute decides for itself, so to speak, what it is, or is not, going to do, and there is nothing in article 1303-3 that can change that. The same objection also applies to the French *jurisprudence*, addressed above. All of it is incorrect on the meta-authority point. Rules which are not independent, and cannot actually govern the things to which they apply, are not rules of subsidiarity.

In the *Transco* case, Lord Hodge seemed to view subsidiarity to statute as part of the Scots law of unjustified enrichment:³³

'[C]auses of action such as recompense are now treated as remedies which apply in various situations where redress of unjustified enrichment is sought. In my opinion the redefinition of the law of unjustified enrichment has not superseded the old rules relating to the law of recompense such as the general rule that the remedy is not available where a pursuer had a legal remedy whether under the common law or under statute and had chosen not to exercise it.'

³¹ See Civ 1re, 4 April 2006, pourvoi n° 03-13986, *Bull civ I*, n° 194; [2006] RLDC, n° 28, 11, observations by S Doireau: 'le caractère subsidiaire reconnu à l'action fondée sur le principe de l'enrichissement sans cause ne constitue pas une fin de non recevoir au sens de l'article 122 du nouveau Code de procédure civile mais une condition inhérente à l'action'; CA Rennes, 18 December 2007, RG n° 06/00867; CA Nîmes, 8 January 2008, RG n° 04/01413; CA Basse-Terre, 5 January 2009, RG n° 05/01889; CA Douai, 26 October 2009, RG n° 08/06633; CA Limoges, 4 March 2013, RG n° 12/00560; CA Metz, 21 September 2017, RG n° 17/00339.

³² See, especially, Soc, 5 November 2009 (n 8).

³³ *Transco* (n 16) [12]-[13].

This position was not questioned in *Courtney's* case.³⁴ But it means that what are seen as rules about the subsidiarity of unjustified enrichment in Scots law are not meta-authorities in relation, either to unjustified enrichment, or institutions with which it might have a boundary dispute. They are part of enrichment law. And rather than exercising any control over the application of conflicting statutes, they ensure unconditionally that unjustified enrichment gives way in the face of them. They are not rules of subsidiarity.

E. Not sovereignty

For a relationship of subsidiarity to exist, no entity said to be part of that relationship can be sovereign over any other entity in that relationship. In such a situation, there would be nothing for subsidiarity to do, because authority in that context would be allocated *unconditionally*. This goes against the essence of subsidiarity – as argued in chapter 2, subsidiarity is a *conditional* idea. The above law and scholarship does not satisfy this principle.

This is another short point, which applies to all of the material above favouring unjust enrichment's subsidiarity to statute. Whenever there is conflict, the above law and scholarship holds that statute always wins against unjustified enrichment. Which is sovereign is obvious. There is no condition which can be satisfied to produce another result. There is no unjustified enrichment on the field on which statute is relevantly at play.

F. Not concurrence

An extant relationship of subsidiarity is incompatible with the free concurrence of the entities said to be part of that relationship. Conditionality would be absent in such a situation, since competence would not be ordered in any way at all. The whole point of subsidiarity is to prevent concurrence which is happening, or might happen without it, as argued in chapter 2.

³⁴ *Courtney's Executors* (n 18) [52] (Lord Beckett).

The law and scholarship discussed here which favours unjust enrichment's subsidiarity to statute infringe the five foregoing principles of subsidiarity. Neither admits that unjust enrichment and conflicting statutes can co-exist, or concur when not restrained by a meta-authority. Neither, therefore, breaches the instant principle of subsidiarity. This is only a small consolation, of course. If there is no concurrence to prevent, subsidiarity is redundant, assuming that it is correct to say that subsidiarity exists in the first place, which, on the accounts here surveyed, it does not.

III. RE-ANALYSIS OF THE CLAIMS

This part of the chapter suggests a better explanation than subsidiarity for unjust enrichment's contingency on the operation of statutes that exclude or limit unjust enrichment claims. It is that statutes which do this *justify enrichments*, to which extent, there is no unjust enrichment to be subsidiary to anything. This argument is presented and related to the principles of subsidiarity developed in this study. That statutes justify enrichments is then demonstrated comparatively. Finally, in separate sections, relevant French and Scots material is analysed more closely.

A. The argument

If, on a given set of facts, an enrichment is justified, then an enrichment claim is impossible on those facts. And the subsidiarity of unjust enrichment is impossible on those facts. Principles of subsidiarity, developed in chapter 2 of this study, and applied to unjustified enrichment and statute in part II of this chapter, are infringed by the contrary argument. Statutes can justify enrichments. To the extent that they do, unjust enrichment claims cannot overlap with any statutory claim, because the former do not exist. If they do not exist, they cannot join a plurality of actions or claims, which could be in a relationship of subsidiarity, or overlap or concur, with any other claims which *do* exist. That unjust enrichment removes itself from the field of play in the face of inconsistent statutes – through its own justification requirement – means that any argument as to enrichment's subsidiarity to statute also infringes this study's proposition that rules of subsidiarity are rules which possess meta-authority over the entities the relationship of which they govern. In sum, enrichment claims cannot be subsidiary to statutory claims. Where, as a matter of statutory interpretation, there is

an inconsistent statutory claim, arguments about unjust enrichment's subsidiarity do not get off the ground. In fact, there is *pro tanto* no unjust enrichment to be subsidiary *in the first place*. The same analysis applies where a statutory regime provided a claim, but does no longer, or where a regime simply excludes the operation of unjust enrichment whilst providing no other redress.

B. Statute as a justification for enrichments in general

What, then, of the law in comparative perspective? Sometimes, a statutory regime will justify a person's enrichment by requiring that an enrichment be transferred.³⁵

*Example.*³⁶ Half Full Ltd abstracts water from Half Empty Ltd's waterways for many years. Half Empty looks over correspondence between the parties and thinks it is owed money in respect of Half Full's activities. It transpires that Half Full has licences to abstract water from Half Empty's waterways under a statutory scheme. Half Full therefore has a right to the water and its enrichment is justified.

There are also cases in which a statute confers no entitlement to any enrichment, but alters a person's claim for restitution against another, to which extent the latter's enrichment is justified.³⁷

³⁵ As where rules of succession confer rights to a person's property: Civ 1re, 28 May 1991, pourvoi n° 89-20258, *Bull civ I*, n° 167; [1992] RTD civ 96, observations by J Mestre. Or where a tax liability must be complied with failing the exercise of any lawful option(s) to avoid it: *Test Claimants In the FII Group Litigation v HM Revenue & Customs* [2008] EWHC 2893 (Ch), [2009] STC 254 [275] (Henderson J); *Commissioner of State Revenue v ACN 005057349 Pty Ltd* [2017] HCA 6, (2017) 341 ALR 46 [87] (Bell and Gordon JJ, with whom Kiefel, Keane and Gageler JJ agreed). See also Soc, 3 May 1974, pourvoi n° 73-10689, *Bull civ V*, n° 276; Soc, 12 February 1987, pourvoi n° 85-11975, *Bull civ V*, n° 74; Clive (n 21) §5(1)(a); *Advocate General for Scotland v John Gunn and Sons Ltd* [2018] CSOH 39 [61] (Lord Uist), though in that case, the statute was declared unlawful retrospectively under European Union law; *KBA Canada Inc v Supreme Graphics Ltd* [2014] BCCA 117, (2014) 372 DLR (4th) 303 [38]-[42] (Groberman J, with whom Low and Nielson JJ agreed).

³⁶ With much simplified facts, this example is based on *Canal & River Trust v Thames Water Utilities Ltd* [2016] EWHC 1547 (Ch) [87] (Asplin J); affirmed on other grounds [2018] EWCA Civ 342.

³⁷ As where a statute excludes inconsistent claims, or extinguishes any rights that contravene it: *R (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54, [2011] 2 AC 15 [15] (Lord Brown, with whom Lord Phillips and Lord Kerr agreed), [35] (Sir John Dyson, with whom Lord Phillips and Lord Kerr agreed), [39] (Lord Rodger); *Littlewoods Ltd v HM Revenue and Customs Commissioners* [2017] UKSC 70, [2017] 3 WLR 1401 [40] (Lord Reed and Lord Hodge, with whom Lord Neuberger, Lord Clarke and Lord Carnwath agreed); *Adrenaline Pty Ltd v Bathurst Regional Council* [2015] NSWCA 123, (2015) 322 ALR 180 [69]-[73] (Leeming JA, with whom MacFarlan and Ward JJA agreed). Or where legislation forbids claims for price increases in relation to fixed price contracts and an unjustified enrichment claim which would circumvent this is denied: Civ, 5 November 1934; [1934] DH 587; [1934] Gaz Pal, II, 848. Or where the remuneration of company

*Example.*³⁸ Rogue Traders Authority fines Cowboys Ltd under a statutory penalty regime. The regime contains an appeal mechanism, providing for a full rehearing and re-quantification on the merits. Cowboys pays its fine. Cowgirls Ltd does not pay, but pursues a successful statutory appeal, the time limit for which subsequently expires. Realising this, Cowboys attempts to claim in unjust enrichment against Rogue Traders. But the true construction of the statutory regime reveals that it was intended to be the only way to dispute the imposition of penalties. Rogue Traders' enrichment is justified.

That, in a nutshell, is the law on statutes as justification for enrichments. In the light of it, the third object of this part of the chapter is to examine more closely the French and Scots sources.

C. French law

The *Code civil* is unhelpful for present purposes.³⁹ But the *jurisprudence* points the way forward. One noted decision of the *Première chambre civile* from 1973 clarifies that 'the rules concerning the *action de in rem verso*' are 'applicable when there exist no special provisions' to govern a given situation.⁴⁰ In a 1995 case, the *Première chambre civile* rejected a lower court's subsidiarity-based reasoning, and granted an

directors is confined to cases provided for by law, and an unjustified enrichment claim for remuneration of work outwith those cases is denied: Com, 16 May 1995 (n 7). Or where an estate agent must have a written contract of mandate to intervene in any transaction and is denied an unjustified enrichment claim if not: Civ 1re, 18 June 2014, pourvoi n° 13-13553, *Bull civ I*, n° 110; [2014] RTD Civ 671, observations by P-Y Gautier; [2014] RTD Com 685, observations by B Bouloc; [2015] AJDI 136, observations by M Thioue. For Scots law, see, *semble*, *Cullen v Advocate General for Scotland* [2016] CSOH 170, 2017 SLT 1 [34]-[44] esp [37] (Lord Armstrong). See also *Gladstone v Canada (Attorney General)* [2005] SCC 21, [2005] 1 SCR 325 [19] (Major J, with whom McLachlin CJ, and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ agreed).

³⁸ This example is based on *Lindum Construction Co Ltd v The Office of Fair Trading* [2014] EWHC 1613 (Ch), [2015] 2 All ER 177 [120]-[121] (Morgan J).

³⁹ *Code civil*, arts 1303-1 and 1303-2(1), were set out in chapter 2. For criticism, see F Chénéde, *Le nouveau droit des obligations et des contrats* (2nd edn, Dalloz 2018) [134.22]-[134.24].

⁴⁰ Civ 1re, 15 February 1973, pourvoi n° 68-13698, *Bull civ I*, n° 61; [1975] D 509, noted by R Savatier; [1975] Defrénois, I, art 10845, 145, long commentary by J Flour: 'selon les règles concernant l'action de *in rem verso*, applicables lorsqu'il n'existe pas de dispositions particulières, l'indemnité due à l'appauvri est égale à la moins élevée des deux sommes représentatives, l'une de l'enrichissement, l'autre de l'appauvrissement'. See also Civ 1re, 29 December 1953; [1953] D, somm, 22: 'it is forbidden to appeal to the idea of unjustified enrichment in an attempt to correct the normal run of legal relations flowing from a contract'; cited by G Marty and P Raynaud, *Droit civil: Les obligations*, vol I (2nd edn, Sirey 1988) no 398, for a proposition substantially identical to that expressed in the 1973 case.

unjustified enrichment action to a person falling outwith a special remuneration regime, on the ground that the statute '[could] not have aimed to exclude' her 'from the benefit of all compensation'.⁴¹ The first pronouncement suggests that, often, where there is a relevant statute, there can be no unjustified enrichment action, because any enrichment would be justified thereby. The second pronouncement suggests that the policy of a statute may be relevant to its effect on an unjustified enrichment claim. These ideas can anchor our thinking as we examine examples.

Both ideas apply easily where statutes require that enrichments be transferred. So, where an employer transferred holiday pay directly to his employees for a period during which a regional scheme did not pay out, he could not resist a claim for his statutorily obligatory subscriptions to the scheme itself on the ground of unjustified enrichment, because the scheme's claim 'resulted from statutory provisions exclusive of the rules of unjustified enrichment'.⁴² So, too, where an enrichment was ordained by a legislative matrimonial property regime, 'which excluded unjustified enrichment' as well.⁴³ To take a final example, a genealogist could not claim in unjustified enrichment against the heirs of a deceased person, who had benefitted because he uncovered the relation between them, thus allowing them to inherit:⁴⁴

'[T]he heirs X draw their enrichment from one of the lawful modes of acquiring rights, in the instant case in the statutory rules [*les règles légales*] governing the transfer of their ascendant's estate; [...] Mr Y

⁴¹ Civ 1re, 14 March 1995, pourvoi n° 93-13410, *Bull civ I*, n° 130; [1996] D 137, noted by V Barabé-Bouchard; [1995] JCP G, II, 22516, noted critically by F Roussel; [1996] RTD Civ 160, favourable observations by J Mestre; [1996] RTD Civ 215 guarded observations by J Patarin; [1996] Defrénois 468, noted by J-L Fillette: '[l]e décret [...] n'a pu avoir pour objet de l'exclure du bénéfice de toute indemnisation; qu'il s'ensuit que l'action *de in rem verso* lui demeure ouverte, faute pour ce conjoint de disposer d'une autre action; [...] l'arrêt attaqué énonce que l'obstacle de droit au paiement [...] ne saurait être tourné par le biais de l'action *de in rem verso*; [e]n quoi la cour d'appel a violé [l'ancien article 1371 du Code civil] [...].'

⁴² Soc, 12 February 1987 (n 35): 'les juges d'appel [...] ont exactement énoncé que la créance de la Caisse résultait de dispositions réglementaires exclusives des règles de l'enrichissement sans cause'.

⁴³ Civ 1re, 10 May 1984, pourvoi n° 83-12370, *Bull civ I*, n° 153: 'ce qui excluait l'enrichissement sans cause'.

⁴⁴ Civ 1re, 28 May 1991 (n 35): 'les héritiers X puisent leur enrichissement dans l'un des modes légaux d'acquisition des droits, en l'occurrence dans les règles légales régissant la dévolution de la succession de leur auteur; que M Y n'était pas fondé, dans ces conditions, à exercer l'action *de in rem verso* pour obtenir la rémunération de ses diligences'. Compare, previously, the opposite solution, in a case in which a *sans cause* argument does not appear to have been raised: Cour de Poitiers, 2 December 1907; [1908] DP, II, 332; [1908] RTD Civ, observations by R Demogue.

could not, therefore, use the *action de in rem verso* to obtain remuneration for his work.'

However, where statutes do not confer rights to enrichments, but are simply inconsistent with unjustified enrichment claims, the account proposed in this chapter conflicts more openly with subsidiarity-based explanations of unjustified enrichment's relations with statute. Several cases are now reanalysed to show that the view taken here is better than subsidiarity. To proceed, recall the 1971 formula of the *Troisième chambre civile*, important in the development of unjustified enrichment's subsidiarity in France:⁴⁵

'Considering that [1.] the action founded on unjustified enrichment can only be admitted if no other action is open to the claimant; that [2.] it cannot be admitted, notably, to supplement another action which the claimant cannot bring as a result of prescription, a forfeiture, a time bar, or because of the effect of *res judicata* or because he cannot produce the necessary proof or because of any other obstacle of law [...].'

To flesh out the argument in this section, prescription and time bars, two relevant elements of the second limb of this holding, are analysed initially, before a look at three more examples in the cases. Take prescription, first, the only specific example of what will attract the subsidiarity rule which survived into the *Code civil*, article 1303-3.⁴⁶ Whether prescription falls under the heading of subsidiarity receives no definitive answer in the cases. Even if they do not always use the vocabulary of subsidiarity,⁴⁷ most reason in terms clearly denoting a subsidiarity analysis when prescription of one action bars an action in unjustified enrichment.⁴⁸ However, the *Chambre sociale* of the *Cour de cassation* held in 2011 that the prescription of an action for payment justified

⁴⁵ Civ 3e, 29 April 1971 (n 3). The second limb of the holding is reproduced in French here for convenience: 'qu'elle ne peut l'être, notamment, pour suppléer à une autre action que le demandeur ne peut intenter par suite d'une prescription, d'une déchéance ou forclusion ou par l'effet de l'autorité de la chose jugée ou parce qu'il ne peut apporter les preuves qu'elle exige ou par suite de tout autre obstacle de droit'.

⁴⁶ *Code civil*, art 1303-3: 'The impoverished person has no action on this basis where another action is open to him or is barred by an obstacle of law, such as prescription.'

⁴⁷ For a case which does, see CA Aix-en-Provence, 4 December 2008, RG n° 07/20133.

⁴⁸ See Civ 3e, 14 November 2002, pourvoi n° 01-10691; CA Versailles, 21 April 2005, RG n° 04/01199.

the defendant's enrichment for the purposes of an unjustified enrichment action.⁴⁹ It is suggested that this is the better view.⁵⁰ As shown in part III(B) of this chapter, statutory justifications for enrichments need not actually confer legal entitlements to them. And any such rule was rejected in chapter 1. Rather, it is simply a matter of policy-based justification. The law says: 'whatever happened, it is no longer unjust'. The law could say, as it might if subsidiarity were an accepted analysis: 'the defendant's enrichment is unjustified, but that does not matter – the claimant's enrichment action is still is against the law, because its other action prescribed'. The former response is more satisfying for the claimant who says: 'but I still think the defendant's enrichment is unjustified'. We should be able to reply: 'no, it is not; carefully read, the law says so'.⁵¹ To stop short would leave the law in a startling state of contradiction, and in need of a basic lesson in irony: injustice in the stultification of the legal order, dealt with by subsidiarity; but no injustice in leaving unjustified enrichments unresolved by the legal system. Only aversion to analysis could produce such a result.

⁴⁹ Soc, 12 January 2011, pourvoi n° 09-69348, *Bull civ V*, n° 21; [2011] D 1198, noted by F Khodri; [2011] JCP S 1167, noted by T Lahalle: 'la cause [...] tenant à la prescription instituée par la loi'.

⁵⁰ We may leave aside here the question whether prescription is substantively extinctive or merely procedurally extinctive – that is, does it extinguish the right along with the action (though, interestingly, an action is also defined in France's *Code de procédure civile*, art 30, (emphasis added)), as 'the right [...] to be heard on the substance'? The *Code civil*, art 2219, suggests that prescription is substantively extinctive. But article 2224 suggests the opposite. The debate about this is longstanding in French law. Luckily, it is sidestepped here by the simple assertion, elaborated in the main text, that it is the policy of the prescription statute, not prescription itself, which justifies relevant enrichments. For cases giving conflicting answers to the substantive-procedural question, see Civ 3e, 5 September 2012, pourvoi n° 11-19200, *Bull civ III*, n° 110; [2013] ADJI 200, observations by J-P Blatter; Civ 2e, 9 July 2009, pourvoi n° 08-16894, *Bull civ II*, n° 194; [2009] AJ fam 347, noted by F Chénéde. For a parcours of the debate, see further A Collin, *Pour une conception renouvelée de la prescription* (Defrénois 2010) nos 561-572.

⁵¹ In English law, limitation is not generally extinctive: *Norwegian Government v Calcutta Marine Engineering Co Ltd* [1960] 2 Lloyd's Rep 431 (QB) 442 (Diplock J); compare, speaking of a substantively extinctive regime, *Bua International Ltd v Hai Hing Shipping Co Ltd (The Hai Hing)* [2000] 1 Lloyd's Rep 300 (QB) 310 (Rix J). But argument that limitation is simply a policy-based justification for enrichments could conceivably apply in England, too; and in Scotland, if the law there barred enrichment actions because others prescribe (it seems not yet to have done this). Since the 'unjust question' in unjust enrichment is unconcerned with entitlements to enrichments (see chapter 1 on this point), whether limitation or prescription take away enrichment actions, or obligations to reverse unjust enrichments (concomitant with rights to their reversal), or both, is strictly irrelevant in both jurisdictions. But it should be noted that, unlike the general position in English law, and more certainly than in French law, personal obligations in Scots law are substantively extinguished on the expiry of prescription periods. For the example of obligations to reverse unjustified enrichment, see Prescription and Limitation (Scotland) Act 1973, s 6(1)-(2) and sch 1, 1(b)-(c). See further D Johnston, *Prescription and Limitation* (2nd edn, W Green 2012) [6.14]-[6.21]. The period starts to run when a person is both enriched, and unjustifiably so: *Thomson v Mooney* [2013] CSIH 115, 2014 Fam LR 15 [6], [8], [10]-[11] (Lord Eassie, with whom Lord Bracadale and Lord Wheatley agreed). See further EJ Russell, *Prescription and Limitation of Actions* (7th edn, W Green 2015) [3.18]. For commentary on earlier confusion, see M Hogg, 'Unjustified Enrichment Claims: When Does the Prescriptive Clock Begin to Run?' (2013) 17 Edinburgh L Rev 405. So the prescription of an unjustified enrichment action justifies any enrichment which might have been reclaimed before the prescription period expires.

Take time bars, secondly. It is well-established that non-extinctive statutory time bars on any action, to recover property,⁵² or to obtain compensation from the state in respect of the loss of certain rights over land,⁵³ for example, take enrichment actions with them. It is submitted that to them applies the same analysis as is put forward about cases in which actions other than those in unjustified enrichment prescribe.

What of some different examples? Another famous case is the *arrêt Marty*. There, a building contractor failed to comply with the statutory publicity requirements of a security he wanted in respect of payment for work. He therefore failed to obtain any priority as creditor in the bankruptcy of the owner of the building on which he had worked. And he was denied an unjustified enrichment action, introduced to circumvent the mishap. The *Cour de cassation* said that he could not ‘elude’ the statutory regime governing distributions from the estate to other unsecured creditors with his claim (though it must be admitted that the operation of the regime to grant rights to the value which he contributed to the estate, such that the other creditors were also straightforwardly entitled to it, was also mentioned directly after this remark).⁵⁴ In his note on the decision, André Rouast forcefully argued that it is a case in which the obstacle of law limb of subsidiarity applied.⁵⁵ But it is suggested that, in common with the situation addressed above, in which an action other than one in unjustified enrichment *prescribes*, such that the latter is inadmissible, the better view is that any relevant enrichment is *justified*. In effect, both the justification and subsidiarity analyses accept that an enrichment can be approved impliedly by the law, which would be stultified if the enrichment action were allowed. But the subsidiarity analysis seems

⁵² Civ, 18-19 July 1910 (four *arrêts*); [1910] Gaz Pal, I, 189, 343; [1911] DP, I, 355; Civ, 22 February 1922; [1923] S, I, 153; prefigured by, eg, Trib civ de Limoges, 16 December 1904; [1905] Gaz Pal, I, 128. For a recent debate on *forclusion*, as against *prescription*, see N Balat, ‘Forclusion et prescription’ [2016] RTD Civ 751; F Rouvière, ‘Prescription et forclusion: différence de nature ou de degré?’ [2017] RTD Civ 529.

⁵³ Civ 3e, 3 January 1978, pourvoi n° 76-13996, *Bull civ* III, n° 3. In that case, claimants had a right to put their animals out to pasture on land which was expropriated. There was a one week period within which the claimants had to make their right known to the state in order to obtain compensation. The claimants let this period elapse, and claimed in unjust enrichment. The action was rejected. The *Cour de cassation* held: ‘the court of appeal rightly observes that having neglected to obtain compensation from the expropriating authority according to [the relevant regulatory provisions], [the claimants] cannot invoke the *action de in rem verso*’ (‘la cour d’appel observe à bon droit qu’ayant négligé de se faire indemniser par l’autorité expropriante dans les conditions prévues par l’ordonnance [pertinente], [les demandeurs] sont irrecevables à invoquer le bénéfice de l’action *de in rem verso*’).

⁵⁴ Civ, 12 February 1923; [1924] D, I, 129, noted by A Rouast.

⁵⁵ [1924] D, I, 129.

to leave the private injustice recognised by unjustified enrichment in existence. There is little point to this, especially given the objections to which the subsidiarity analysis is open, seen in part II of this chapter. The more legally coherent analysis, and the one which provides the best response to disappointed claimants, is the justification explanation.

Let us next look at the scenario which gave rise to the famous *arrêt Briauhan*.⁵⁶ Article 1793 of the *Code civil* provides:⁵⁷

‘When an architect or a contractor has undertaken to erect a building at a fixed price, according to plans settled and agreed upon with the owner of the land, he cannot ask for any increase in the price, either under the pretext of an increase in the cost of labour or materials, or under that of changes or additions made in the plans, unless those changes or additions have been authorized in writing and the price agreed with the owner.’

In *Briauhan*, a town conferred the use of its thermal baths and casino to a businessman. It contracted with him that improvement works could be done, on the express condition that it would pay only a fixed price. The businessman ordered the works. Costs exceeded the stated sum. So one of the contractors claimed in unjustified enrichment against the (indirectly) commissioning town, for what to him amounted to extra work. In the second limb of its holding,⁵⁸ the *Chambre civile* of the *Cour de cassation* said that the *action de in rem verso* ‘cannot be brought with a view to escaping the rules by which statute [*la loi*] has expressly defined the effects of a

⁵⁶ Civ, 2 March 1915 (n 10).

⁵⁷ *Code civil*, art 1793: ‘Lorsqu’un architecte ou un entrepreneur s’est chargé de la construction à forfait d’un bâtiment, d’après un plan arrêté et convenu avec le propriétaire du sol, il ne peut demander aucune augmentation de prix, ni sous le prétexte de l’augmentation de la main-d’œuvre ou des matériaux, ni sous celui de changements ou d’augmentations faits sur ce plan, si ces changements ou augmentations n’ont pas été autorisés par écrit, et le prix convenu avec le propriétaire.’ The translation relied on here is DW Gruning (tr), *Code Civil as of 1 July 2013* (Juriscope 2014) <https://www.legifrance.gouv.fr/Media/Traductions/English-en/code_civil_20130701_EN>.

⁵⁸ The first limb was, of course, as follows. ‘[T]he *action de in rem verso* must only be granted in cases in which, the patrimony of one person is enriched without legal ground at the expense of that of another, and the latter, to obtain what is due to him, has no other action arising from a contract, a quasi-contract, a delict or a quasi-delict’: Civ, 2 March 1915 (n 10).

specific contract, nor, as a result, [can it be brought] by a contractor to disguise a claim for extra costs, forbidden [...] in the presence of a fixed price contract'.⁵⁹

Now, it was mentioned in chapter 3 that this judgment is supposed to be a turning point in, or is perhaps part of the start of, subsidiarity's story in French enrichment law.⁶⁰ As a matter of history, it was shown to be nothing of the sort. But as a matter of substance, too, it is better analysed as a case in which the defendant town's enrichment represented by the claimant contractor's perceived overperformance was *justified*. The court's language speaks, albeit softly, to the policy behind article 1793, of providing certainty for contracting parties.⁶¹ It seems reasonable to bring this to bear on the justice of the town's enrichment, and not merely stop at whether the enrichment claim is admissible, as do subsidiarity-based analyses. Clearer evidence exists in other cases that policy specifically influences the application of article 1793 to the exclusion of unjustified enrichment. In 1925, the *Cour d'Ameins* held that, since it was clear that the contracts before it fell under article 1793, 'no equitable tempering [could] be afforded' to a contractor 'based on the *action de in rem verso*'.⁶² The *Cour de cassation* remarked in 1934 that 'fixed price agreements are contracts of strict interpretation', and that 'the allegation of an unjustified enrichment cannot disguise a

⁵⁹ *ibid*: 'qu'elle ne peut être intentée en vue d'échapper aux règles par lesquelles la loi a expressément défini les effets d'un contrat déterminé, ni, par suite, par un entrepreneur, pour servir à déguiser une demande en supplément de prix prohibée [...] en cas de marché à forfait'.

⁶⁰ The similarly vaunted *arrêt Clayette* was also cited earlier in this chapter: Civ, 12 May 1914 (n 10).

⁶¹ A policy evidenced, by, eg, Civ 3e, 11 May 2006, pourvoi n° 04-18092, *Bull civ* III, n° 118: art 1793 prevailed over standard form; Civ 3e, 20 November 2002, pourvoi n° 00-14423, *Bull civ* III, n° 230; [2003] Defrénois 318, observations by H Périnet-Marquet: regulatory changes increasing costs, and strikes affecting the works, do not permit the non-application of art 1793 by ignoring the fixed-price nature of the contract; Civ 3e, 20 November 1991, pourvoi n° 89-21858, *Bull civ* III, n° 281: serious and precise document with contractual force required for the exception in art 1793 to apply. But because of these strictures, the courts ensure that art 1793 is applied precisely. See, eg, Civ 3e, 29 October 2003, pourvois n°s 02-13460, 02-16542, *Bull civ* III, n° 185 (two *arrêts*); [2004] Defrénois 447, observations by H Périnet-Marquet: orca tank and swimming pool not buildings to which art 1793 applies; Civ 3e, 23 June 1999, pourvoi n° 98-10276, *Bull civ* III, n° 147; [1999] Defrénois 1127, observations by H Périnet-Marquet: occasional renovation not the construction of a building, to which art 1793 applies. Compare Civ 3e, 3 July 1991, pourvoi n° 89-20299, *Bull civ* III, n° 200: electrical works on a hotel under construction are building works to which art 1793 applies.

⁶² *Cour d'Ameins*, 18 May 1925; [1926] DP, II, 52: 'que le tempérament d'équité ne peut être apporté, basé sur l'*action de in rem verso*'.

claim for extra costs, explicitly forbidden by art[icle] 1793'.⁶³ The *Tribunal civil de Bordeaux* once observed:⁶⁴

'[T]he very rigorous conditions of art[icle] 1793 would become a dead letter if, in the absence of the two conditions which this article requires most strictly, a [price] increase were granted via the misuse of the *action de in rem verso*; considering that, put shortly [*en un mot*], art[icle] 1793 must be interpreted such that, when, following the conclusion of a fixed price contract with an architect or a contractor, there have been additional works without written authorisation or an agreed price, there is a legal presumption incapable of being rebutted by proof to the contrary, that the additional works have been done without a price increase [...].'

That position is a small step from the analysis proposed in this chapter, that, as a matter of policy, the codal provision is justifying the relevant enrichment here. The *Cour de cassation* held in the 1970s, citing article 1793, that a fixed price contract could constitute a legal ground for an enrichment represented by extra works.⁶⁵ It would surprise if the *Code* itself could not do likewise, especially when the justification-by-statute analysis enjoys a considerable advantage over, and suffers none of the defects of, the subsidiarity approach.

As a third more general example, we turn to a decision of the *Première chambre civile* of the *Cour de cassation* from 2014. A company instructed an estate agent to find it land on which to build. No written contract was concluded for this purpose. The agent

⁶³ Civ, 5 November 1934 (n 37): 'que l'entreprise à forfait est un contrat de droit strict; [...] l'allégation d'un enrichissement sans cause ne [peut] servir à un entrepreneur pour déguiser une demande en supplément de prix formellement prohibée par l'art[icle] 1793 [du *Code civil*], en cas de marché à forfait [...]'

⁶⁴ Trib civ de Bordeaux, 10 February 1909; [1909] *Gaz Pal*, I, 745: 'les prescriptions, cependant très rigoureuses de l'art[icle] 1793 deviendraient lettre morte si, en l'absence des deux conditions que cet article exige impérieusement, une augmentation était accordée par le moyen détourné de l'action de in rem verso; [a]ttendu, en un mot, que l'art[icle] 1793 doit s'entendre en ce sens que, lorsqu'après un marché à forfait avec un architecte ou un entrepreneur, il y a eu des travaux supplémentaires sans autorisation écrite ou sans un prix convenue, il y a présomption légale non susceptible d'être combattue par la preuve contraire, que les travaux supplémentaires ont été accordés sans supplément de prix'.

⁶⁵ Civ 3e, 23 April 1974, pourvoi n° 73-10643, *Bull civ III*, n° 162. See previously, but without directly citing article 1793, Civ, 21 February 1944; [1944] *Gaz Pal*, I, 249.

found land and drew up an agreement between its client and the landowner. But the deal never went through. And the client passed the opportunity on to another company, which bought the land at the same price and according to the same conditions as the initial deal. The estate agent sued this other company in unjustified enrichment, for having benefited from the work it did on the aborted original transaction. The *Cour de cassation* quashed the court of appeal, which had allowed the enrichment action to succeed.⁶⁶

‘Having seen article 1371 of the *Code civil*, along with articles 6-I of law [loi] n° 70-2 of 2 January 1970, and 72 of decree [décret] n° 72-678 du 20 juillet 1972;

Considering that the rules of unjustified enrichment cannot disrupt the provisions of the latter two texts, which are a matter of public policy [*dispositions d’ordre public*], and which condition the lawfulness of the intervention of an estate agent in any land transaction, and, consequently, its right to remuneration and compensation, upon its possessing a written delivered for this purpose by one of the parties to the transaction; [...]

Considering that [...] the judgment below, in ordering [the defendant] to pay to [the claimant] the sum of 50,000 euros on the basis of the *action de in rem verso*, holds that the exercise of this action [...] is not intended to circumvent the provisions of law n° 70-2 of 2 January 1970 since the parties could not have been bound by any mandate, the benefit which the [defendant] purchaser drew from the work of the

⁶⁶ Civ 1re, 18 June 2014 (n 37): ‘Vu l’article 1371 du Code civil, ensemble les articles 6-I de la loi n° 70-9 du 2 janvier 1970 et 72 du décret n° 72-678 du 20 juillet 1972; Attendu que les règles de l’enrichissement sans cause ne peuvent tenir en échec les dispositions d’ordre public de ces deux derniers textes, lesquels subordonnent la licéité de l’intervention d’un agent immobilier dans toute opération immobilière, et partant, son droit à rémunération comme à indemnisation, à la détention d’un mandat écrit préalablement délivré à cet effet par l’une des parties à l’opération; [...] Attendu qu[e] [...] l’arrêt, pour condamner [le demandeur] à payer [au défendeur] la somme de 50.000 euros sur le fondement de l’action *de in rem verso*, retient que l’exercice de cette action [...] n’a pas vocation à contourner les dispositions de la loi n° 70-9 du 2 janvier 1970 puisque les parties ne pouvaient pas être liées par un mandat, le bénéfice que [le défendeur] a tiré gratuitement du travail de l’agent immobilier lui ayant été transmis par un tiers [...]; Qu’en statuant ainsi, la cour d’appel a violé les textes susvisés, le premier par fausse application, les deux derniers par refus d’application [...].’

[claimant] estate agent without providing anything in return [*gratuitement*] having been transferred to it by a third party [*ie* the company which initially engaged the estate agent];

That in so holding, the court of appeal has violated the above-cited texts, incorrectly applying the first, and failing to apply the latter pair [...].’

This continues the *Cour de cassation*’s strict interpretation of the regime containing the provisions referred to in the extract above. The court has also held, for example, that it cannot be circumvented using delict,⁶⁷ an implied contract of mandate (*mandat apparent*),⁶⁸ or the doctrine of *negotiorum gestio*.⁶⁹ At work here seems to be a legislative policy of protecting people against wily estate agents. This policy was recognised by a *Chambre mixte* of the *Cour de cassation*, when concerned with a different point of interpretation arising from the same statute.⁷⁰ Indeed, though some see the above case as a decision on subsidiarity,⁷¹ it contains no subsidiarity-based reasoning at all. And in a reiteration of that 2014 decision, the *Première chambre civile* recounted, but *ignored*, subsidiarity-based reasoning in the arguments before it. Instead, the court analysed the circumstances in public policy terms.⁷² This demonstrates that there is no need for subsidiarity to reach conclusions desired by the courts, even if statutes do not actually confer rights to enrichments. As in England, or

⁶⁷ Civ 1re, 3 February 2004, pourvoi n° 01-17763, *Bull civ I*, n° 2; [2004] ADJI 484, observations by M Thioye; [2004] RTD Com 587, observations by B Bouloc.

⁶⁸ Civ 1re, 31 January 2008, pourvoi n° 05-15774, *Bull civ I*, n° 30; [2008] D 485, observations by Y Rouquet; [2008] ADJI 879, observations by M Thioye; Civ 1re, 5 June 2008, pourvoi n° 04-16368, *Bull civ I*, n° 163; [2008] ADJI 882, observations by M Thioye.

⁶⁹ Civ 1re, 22 March 2012, pourvoi n° 11-13000, *Bull civ I*, n° 72; [2012] ADJI 613, observations by M Thioye; [2012] RTD Civ 528, observations by B Fages.

⁷⁰ Ch mixte, 24 February 2017, pourvoi n° 15-20411, *Bull mixte*, forthcoming; [2017] D 793, with explanatory note by the *Cour de cassation*, and case note by B Fauvarque-Cosson; [2017] RDC 415, observations by T Genicon: ‘par la loi du 2 janvier 1970 réglementant les conditions d’exercice des activités relatives à certaines opérations portant sur les immeubles et les fonds de commerce, dite loi Hoguet, le législateur a entendu, tout à la fois, réguler la profession d’agent immobilier et protéger sa clientèle [...]’.

⁷¹ See, eg, G Chantepie and M Latina, *La réforme du droit des obligations – Commentaire théorique et pratique dans l’ordre du Code civil* (2nd edn, Dalloz 2018) 691 and note 6; P Malaurie, L Aynès and P Stoffel-Munck, *Droit des obligations* (10th edn, LGDJ 2018) no 1071 and note 49.

⁷² Civ 1re, 31 January 2018, pourvoi n° 17-10340. Subsidiarity-based arguments were before the court in its 2014 decision, also. But these were not reproduced or addressed in the actual judgment.

Australia, and Canada,⁷³ the policy behind a given statutory regime can exclude unjustified enrichment claims in France.⁷⁴ To provide the best answer to disappointed claimants, and avoid the illogical muddle caused by subsidiarity, we should explain statute's ability to do this is on the basis that it can render enrichments *just*.

To round off this section, we will see that unjustified enrichment discourse in France does contain the conceptual thinking required for the view put forward to work. This might render it more palatable to a French audience.

As far back as 1899, Georges Raynaud said that 'the *action de in rem verso* can only be brought if it does not violate any principle of law', and referred on the same page as that statement to the idea of its possibly being against 'some text' (*quelque texte*), ie, legislation.⁷⁵ Shortly after the turn of the twentieth century, Constantin Stoïcesco agreed, similarly shortly, but a little more clearly.⁷⁶ Raynaud was against subsidiarity.⁷⁷ Stoïcesco did not address it at all. Their affirmations did not come under any treatment of a *sans cause* requirement, either.⁷⁸ However, in discussing what will justify an enrichment, and before he lengthily surveys German theorists (in the contemporary absence of French law and scholarship), Stoïcesco stated simply that (i) enrichments which occur because use has been made of a right will be justified, whereas (ii) those which occur wrongly, in the broad sense that they should not have left a person's patrimony, will not.⁷⁹ To at least some extent, these propositions amount to saying that enrichments approved by the law will not be reversed: the second leaves open the

⁷³ CPAG (n 37) [15] (Lord Brown, with whom Lord Phillips and Lord Kerr agreed), [35] (Sir John Dyson, with whom Lord Phillips and Lord Kerr agreed), [39] (Lord Rodger); *Adrenaline* (n 37) [69]-[73] (Leeming JA, with whom MacFarlan and Ward JJA agreed); *Gladstone* (n 37) [19] (Major J, with whom McLachlin CJ, and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ agreed).

⁷⁴ Or, of course, contribute to their success, as in Civ 1re, 14 March 1995 (n 41), discussed above.

⁷⁵ G Raynaud, *De l'action «de in rem verso» en droit civil français* (LNDJ 1899) 92: 'l'action de in rem verso ne peut s'exercer que si elle ne viole aucun principe de droit'.

⁷⁶ CC Stoïcesco, *De l'enrichissement sans cause* (Chevalier-Marescq 1904) 144: 'l'enrichissement illégitime peut toujours être répété à l'aide de la *condictio sine causa*, à moins d'un texte de loi contraire [...]'.

⁷⁷ Raynaud (n 75) 89-93, 145 and note 2 (the latter reference containing the language of subsidiarity).

⁷⁸ *ibid*, 81-87; Stoïcesco (n 76) 73-97.

⁷⁹ Stoïcesco (n 76) 74: 'Si l'enrichissement est obtenu d'une façon légitime, en usant simplement d'un droit, personne ne peut songer à en réclamer la restitution [...]. Pour que l'enrichissement soit susceptible d'être répété, il faut qu'il soit survenu à tort au profit de quelqu'un, alors que la valeur qui le représente n'aurait point dû quitter le patrimoine d'un autre. Autrement dit, il faut que cet enrichissement n'ait pas de fondement légitime, qu'il soit dépourvu de cause.' We see here that Stoïcesco probably thought that justifications for enrichments much confer rights to them. But this analysis of the requirement that an enrichment be unjustified was rejected in chapter 1.

possibility that the law will only implicitly approve a person's impoverishment, rather than grant a right to it. The argument in this chapter is, of course, that enrichments which are expressly or impliedly approved by statute are *not* unjustified, such that unjust enrichment does not *exist* in such a situation. The above two authors, working over a century ago, provide clear tangential support for this view. It survives through time to the present day.

Emile Bouché-Leclercq's 1913 thesis on unjustified enrichment reads futuristically. His definition of the *sans cause* requirement could appear in the latest French accounts:⁸⁰

'One must, then, [...] simply ask oneself whether the defendant had a right to the value received or, more broadly, if, given that he has received it, he can make an argument of law or *équité*, which allows him to keep it. And if we want to keep the word *cause*, we must make its meaning more precise by adding to it *juste*, and talk of *juste cause d'enrichissement*, or, even better, of *juste cause de rétention de l'enrichissement*.'

And he clearly thought that statutes not conferring rights to enrichments, but simply posing rules of law which would be violated if enrichment actions were allowed, were *justes causes* for enrichments.⁸¹ This obviously supports this chapter's argument.

René Demogue's 1923 work also supports the argument presented in this chapter.⁸² In his view, statutes which do not confer rights to enrichments are simply other

⁸⁰ E Bouché-Leclercq, *De l'action "de in rem verso" en droit privé* (Sirey 1913) 140: 'Il faut donc [...] simplement se demander si le défendeur avait droit à la valeur qu'il a recueillie ou, plus largement, si, étant donné qu'il l'a en fait recueillie, il peut faire valoir un argument de droit ou d'équité qui l'autorise à la conserver. Et si l'on veut conserver le mot de cause, il faut en préciser la signification par l'épithète juste, et parler de « juste cause d'enrichissement » ou, mieux encore, de « juste cause de rétention de l'enrichissement ».'

⁸¹ *ibid*, 165-181 esp 165 *in fine*, 170-172, 180 *in fine*.

⁸² It must be conceded that Demogue's more general views were controversial. For better or worse, a French reader will likely be less inclined to take his word. His point of departure (quite acceptable to many Anglophone lawyers) was that law is surrounded by an intractable balance of competing interests, that no single idea of justice provides a right answer, and that some incoherence is inevitable in the legal system. His *Les notions fondamentales du droit privé* (Rousseau 1911) is arresting in places. But it did not meet with approval. Prominent names lauded his '*ingéniosité*', but gave no quarter. See, eg, critical reviews by H Capitant, 'Les notions fondamentales du droit privé d'après le livre de M Demogue' [1911] RTD Civ 729; F Gény, 'Compte rendu critique: R Demogue – Les Notions fondamentales du droit privé' (1911) 35 *Nouv Rev Hist Dr Fr & Etr* 110. The latter accused Demogue of 'nihilism'. Despite

justifications for enrichments. This is based on policy. Here is his general principle and a specific example:⁸³

‘There are cases in which the law prefers to give total security to the party enriched because he has acted in a manner which seems worthy of interest, [and] the law protects the activity. [...] We must accept this when statute establishes a predetermined time for [the] forfeiture [of a right].’

Other authors, however, do not support so clearly the argument put forward in this chapter. The thinking is there. But it often appears in their respective treatments of subsidiarity, and not of the requirement that an enrichment be unjustified for an *action de in rem verso* to succeed. André Rouast, for example, believed that the latter requirement related to ‘social necessity’.⁸⁴ And he included statutes conferring rights to enrichments as possible justifications for them. However, this was done in the context of his overall view of the *sans cause* requirement, namely that justifications for enrichment are *contreparties d’enrichissements*.⁸⁵ That is to say, there must be a reciprocal *return* for an enrichment, in order for it to be justified.⁸⁶ On a this point, then, Rouast’s analysis does not assist this chapter’s argument. On subsidiarity, however, Rouast did turn to policy. Here, we can tap into his work. He felt that subsidiarity was justified generally by the origin of *enrichissement sans cause*, not in positive law –

the success of his *Méthode d’interprétation et sources en droit positif français* (2nd edn, II vols, LGDJ 1919 (1st edn by Chevalier-Marescq, 1899)), Gény was afraid enough of what he read to quest after even more completeness in his very cautious attempt – from which Demogue sharply diverged – to free French legal thought from its previously heavily exegetic methods. He went on, over more than a decade, to produce the mammoth *Science et technique en droit privé positif* (IV vols, Sirey 1914-1924). See, citing private correspondence, C Jamin, ‘Demogue et son temps’ (2006) 56 RIEJ 5, 11-12. Volume 56 of the *Revue interdisciplinaire des études juridiques* is dedicated to Demogue, and contains fascinating contributions about him and his work.

⁸³ R Demogue, *Traité des obligations en général*, vol III (LNDJ 1923) nos 161-165, esp 164 and note 2; citing Civ, 18-19 July 1910 (four *arrêts*) (n 52): ‘Il y a des cas dans lesquels la loi préfère donner toute sécurité à l’enrichi parce qu’il a agi d’une manière qui semble digne d’intérêt [et] la loi protège l’activité. [...] Il faut en dire autant si la loi établit un délai préfixe de déchéance.’

⁸⁴ Rouast (n 11) 106.

⁸⁵ *ibid*, 78: ‘un avantage peut aussi avoir sa contre-partie dans le droit que la loi donnait à une personne de le recevoir’.

⁸⁶ *ibid*, 60-81, esp 76 (original emphasis): ‘La cause dont l’absence est indispensable à l’exercice de l’action de in rem verso est donc simplement la contre-partie soit de l’appauvrissement soit de l’enrichissement, contre-partie qui consiste dans la considération d’une contre-prestation, d’un avantage personnel ou d’un motif moral, et que l’agent estime compenser son appauvrissement.’

legislation – but in natural law:⁸⁷ to avoid chaos, doctrines sourced in the latter cannot circumvent those sourced in the former. Yet further practical reasoning applied to more specific problems. So, Rouast explained the subsidiarity of the *action de in rem verso* in cases where other actions prescribe on the social need, pursued by the legislator, to protect the institution of prescription.⁸⁸ And, after giving other examples,⁸⁹ he concluded:⁹⁰

‘The *action de in rem verso* can never, then, allow [a person] to circumvent a statutory obstacle blocking resort to a [given] action. It cannot authorise any fraud on the law, whatever the consequences may be.’

Julien Bonnecase’s 1926 work also requires some interpretation if it is to support this chapter’s argument. For him, subsidiarity meant that ‘if, in the presence of an enrichment and a correlative impoverishment or, more precisely, a transfer of value from one person to another, we are led to conclude that the situation is embraced by the framework of a given institution of positive law, one must indisputably [*résolument*] abandon any reliance on the notion of unjustified enrichment’.⁹¹ And the *sans cause* element of the *action de in rem verso* was ‘the non-justification by law of the enrichment’.⁹² But what is the latter, if not the former? Such confusion plays to this chapter’s advantage.

⁸⁷ *ibid*, 95-96, 104-107.

⁸⁸ *ibid*, 85: ‘Je n’ai relevé aucun arrêt relatif à l’action civile prescrite; le refus de l’action *de in rem verso* en pareil case ne paraît pas pouvoir être sérieusement discuté. Si on admettait l’action, le but social poursuivi par le législateur dans l’institution de la prescription serait compromis; la prescription deviendrait une institution inutile, d’effet illusoire. Aucune législation, aucune jurisprudence[,] ne saurait tolérer pareille situation.’

⁸⁹ *ibid*, 85, addressing the example provided by *Code civil*, art 1793.

⁹⁰ *ibid*, 86: ‘L’action *de in rem verso* ne peut donc jamais permettre de tourner un obstacle légal qui s’oppose à l’exercice d’une autre action. Elle ne saurait autoriser aucune fraude à la loi, quelles que soient les circonstances.’

⁹¹ Bonnecase (n 12) nos 145-156 esp 153: ‘si, en présence d’un enrichissement et d’un appauvrissement corrélatifs ou, plus exactement, en face d’un déplacement de valeur de la tête d’une personne sur celle d’une autre, on est amené à constater que la situation rentre dans le cadre d’une institution de droit positif déterminée, il faut résolument abandonner tout appel à la notion d’enrichissement sans cause.’

⁹² *ibid*, nos 176-185 esp 176, 180: ‘la non-justification en droit de l’enrichissement’. It is conceded that Bonnecase probably thought that it was necessary that justifications confer rights to enrichments, given his view that what is *sans cause* ‘boils down to determining the element to which the law attaches to convert into a legal relation the factual relation between two persons the circumstances in which one has been enriched at the other’s expense’ (*‘sans cause, se ramène donc à déterminer l’élément auquel le droit s’attache pour convertir en relation de droit la relation de fait issue entre deux personnes de la*

The only book-length consideration of the subsidiarity of the *action de in rem verso*, from 1931, can also be read to support the view taken here. It views the *sans cause* requirement as straightforwardly requiring a *moral, natural law evaluation*, of an enrichment's propriety, and rejects the idea, under any single formula, of *cause, source d'obligation* – that is, of justifications conferring rights to enrichments, such as gifts, wills, contracts, delicts (enrichments being retained against money damages), and so on.⁹³ As to subsidiarity, this is justified by the avoidance of fraud on the law.⁹⁴ And for Almosnino, a principal limit to the *action de in rem verso* under the heading of subsidiarity, is respect for other legal institutions: no enrichment actions against any imperative rule of law (*'disposition impérative de la loi'*).⁹⁵ But it would be more 'moral' simply to say that cases in which an *action de in rem verso* would infringe a rule of law are not cases of unjustified enrichment at all. This argument seems doubly to apply to George Ripert's account, which bases both the *sans cause* condition and subsidiarity straightforwardly on moral duty (*'le devoir moral'*).⁹⁶

In his *refonte* of Marcel Planiol and George Ripert's influential *Traité pratique*,⁹⁷ Paul Esmein clearly separates legal grounds from subsidiarity. Legal grounds arise when enrichments or impoverishments (these are distinguished, too) occur in the performance of a contract, with donative intent, via a statutory or natural obligation, and where the party impoverished acts in its own interest or with the intention necessary to engage the doctrine of *negotiorum gestio*.⁹⁸ Esmein's view of subsidiarity, first expressed in his note on the *Gorge* case,⁹⁹ is restrictive. For him, it only bars the *action de in rem verso* in cases of indirect enrichment, unless there is no

circonstance que l'une s'est enrichie au détriment de l'autre): *ibid*, no 176 *in fine* (original emphasis). But this analysis of the requirement that an enrichment be unjustified was rejected in chapter 1.

⁹³ N Almosnino, *Le caractère subsidiaire de l'action de in rem verso* (LGDJ 1931) 56-71.

⁹⁴ *ibid*, 89-92, 128-134, 176.

⁹⁵ *ibid*, 128-134.

⁹⁶ *La règle morale dans les obligations civiles* (4th edn, LGDJ 1949) nos 133-147 esp 143-147. Earlier editions of this work appeared from the same publisher in 1925, 1927, and 1935.

⁹⁷ For a brief explanation in English of its weight, and a comparison with contemporary work, see A Tunc, 'Book Review' (1956) 69 *Harvard L Rev* 1157.

⁹⁸ P Esmein, *Traité pratique de droit civil français par Marcel Planiol and Georges Ripert*, vol VII (P Esmein, J Radouant and G Gabolde eds, 2nd edn, LGDJ 1954) nos 756(1), 757-760.

⁹⁹ Req, 11 September 1940; [1940] *Gaz Pal*, II, 114; [1941] S, I, 121, noted by P Esmein. It will be recalled from chapter 3 that the formula of subsidiarity which Esmein there expressed was adopted in what stood as a major decision on the requirement until the 2016 recodification: Civ 3e, 29 April 1971 (n 3).

legal ground for a given enrichment, and the primary (usually contractual) debtor of the party impoverished is insolvent. But there is a distinct, third rule in Esmein's account.¹⁰⁰ From the *arrêts Clayette* and *Briahuant*,¹⁰¹ he extrapolates, not subsidiarity, but a rule that the *action de in rem verso* is barred where 'definite rules of positive law would be frustrated by its being allowed'.¹⁰² 'It is unacceptable', says Esmein, 'that these rules, even when their effect is to approve an enrichment without return [*sans contrepartie*], might be abrogated by such roundabout means' as use of the *action de in rem verso*, for this would be a 'manoeuvre amounting to fraud on the law'.¹⁰³ However, this approach does allow, in Esmein's view, a more relaxed attitude to the admissibility in principle of *actions de in rem verso* when others fail: as long as there is no fraud on the law, Esmein does not see why, for example, *negotiorum gestio* or delictual actions should not be backed up by unjustified enrichment in case they fail, but he would continue vigorously to protect the institution of prescription.¹⁰⁴

Esmein's account is sophisticated. But it is submitted that it is still open to the basic objection in this chapter. From the interpretation of legislative intent to discover fraud on the law, it is but a small and more satisfying step to legal grounds. This applies equally to other work by Esmein which takes the same approach,¹⁰⁵ and all other modern accounts using legislative intent to apply subsidiarity in cases where unjustified enrichment potentially conflicts with statute. Notable more recent proponents of this method include François Chabas, continuing the brothers

¹⁰⁰ Esmein (n 98) nos 756(2), 761-762 suite.

¹⁰¹ Civ, 12 May 1914 (n 10); Civ, 2 March 1915 (n 10).

¹⁰² Esmein (n 98) no 761.

¹⁰³ *ibid*, no 761: 'Il n'est pas admissible que ces règles, même quand elles ont pour effet de consacrer un enrichissement sans contre-partie, soient abrogées par cette voie détournée, que, par exemple, la prescription extinctive ne puisse libérer entièrement un emprunteur d'argent sous prétexte qu'en ne remboursant pas la somme prêtée il s'enrichit sans cause. On peut envisager de supprimer, dans notre droit, la prescription extinctive [...]. Mais le faire par la voie détournée de l'action *de in rem verso*, constituerait une manœuvre s'appartenant à la fraude à la loi.'

¹⁰⁴ *ibid* no 762 suite.

¹⁰⁵ See, eg, his slightly earlier treatment of the *action de in rem verso* in his continuation of Charles Aubry and Charles-Frédéric Rau's *Cours*: P Esmein (ed), *Aubry & Rau: Cours de droit civil français*, vol IX (6th edn, Librairie Techniques 1953) nos 577-578(2)-(5).

Mazeauds' *Leçons de droit civil*,¹⁰⁶ and Eric Savaux, continuing Jacques Flour and Jean-Luc Aubert's *Fait juridique*.¹⁰⁷

We now come full circle from early twentieth century work by the more progressive writers, Bouché-Leclercq and Demogue, to note a final detail. Some modern commentators do indeed openly use policy to justify more generally the requirement that an enrichment must be unjustified before its restitution will be ordered. Their respective treatments of the legal rules in play vary in both details and depth. But it is still interesting that eliminating 'internal contradiction' and promoting legal certainty,¹⁰⁸ or the maintenance of economic activity,¹⁰⁹ for example, are sometimes freely invoked to underpin them. To promote these ideas, and others, French lawyers might consider salvaging defensible policy-based thinking from its discredited subsidiarity-based cradle. It could then be used more explicitly, and on the more stable basis of the justification condition.

D. Scots law

In Scots law, though a recent decision suggests that enrichments to which rights are conferred by statute are not unjustified,¹¹⁰ the weight of what few cases exist supports dealing with unjustified enrichment's conflicts with statute by way of subsidiarity. That is the effect of *Transco*, and *Courtney's* case. But the argument in this chapter can still

¹⁰⁶ Chabas (n 15) no 709; cited with approval by CP Filios, *L'enrichissement sans cause en droit privé français* (Bruylant 1999) no 543, who makes clear his wholehearted support; and by Romani (n 15) no 336, who states: 'Le résultat de l'objection de subsidiarité, afin d'être incontestable, devrait être conforme aux vues du législateur, pour le cas visé.'

¹⁰⁷ J Flour, J-L Aubert and E Savaux, *Les obligations, II: Le fait juridique* (14th edn, Sirey 2011) no 56. See also J Nguebou Toukam, 'Réflexions sur les applications contemporaines du principe de la subsidiarité dans l'enrichissement sans cause' [1997] RRJ 923, 935-937.

¹⁰⁸ A Bénabent, *Droit des obligations* (17th edn, LGDJ 2018) no 485: 'La « cause » peut être ici définie comme la justification juridique de l'enrichissement. Si le bénéficiaire s'enrichit grâce à un mécanisme de droit, même aux dépens d'autrui, on ne peut lui demander de restituer cet enrichissement: ce serait ouvrir dans le système juridique une sorte de contradiction interne et porter une grave atteinte à la sécurité de ceux qui se sont fiées à telle ou telle règle de droit. L'article 1303-1 exprime cette idée...'

¹⁰⁹ L Andreu and N Thomassin, *Cours de droit des obligations* (3rd edn, Gualino/Lextenso 2018) no 1750: 'La réunion des conditions matérielles ne suffit pas, sans quoi l'enrichissement sans cause paralyserait toute activité économique: il obligerait toute personne qui reçoit une prestation à la restitution, même lorsque le transfert de valeur est juridiquement causé. Pour donner lieu à une créance quasi-contractuelle, l'enrichissement doit ainsi être injustifié, « sans cause ».'

¹¹⁰ *John Gunn* (n 35) [61] (Lord Uist), though not on the facts as the statute was retrospectively declared unlawful under European Union law.

be made. It must first be shown that Scots law does not require that a legal ground entitle a defender to an enrichment.

In his *Rules*, Clive listed several examples of 'legal cause'. Two were 'enactment' and 'rule of law'. Elaborating, Clive said that he had in mind 'an enactment or rule of law which confers rights directly and not [...] in so far as it operates indirectly by regulating the effects of court decrees, contracts, wills, trusts, gifts or other legal causes' (these latter matters being listed separately as specific legal causes).¹¹¹ This entitlement requirement was justified by Clive as follows:¹¹²

'This sub-rule is inserted to meet the quibbling criticism that if enactments and rules of law are referred to as legal causes there is no need to refer to anything else. Enactments and the common law may be direct sources of rights as well as sources of law and it is as direct sources of rights that they are referred to in rule 5(1).'

This also allows his rule 11(1)(a), discussed in parts I and II of this chapter as a claim about unjustified enrichment's subsidiarity to statute, to operate on a conceptually independent basis. At a glance, this approach is discerning. But it does not meet the central objection in this chapter: what does it mean to say that an enrichment is approved by the law, if it does not mean that it is not unjustified, and, therefore, that unjustified enrichment does not exist? Clive might say: 'quite a lot'. This chapter says: 'very little'. Let us clear the ground.

Some Scottish cases favour a conception of legal ground as entitlement.¹¹³ This may be encouraged by language in the leading authorities. In *Shilliday v Smith*,¹¹⁴ for

¹¹¹ Clive (n 21) rule 5(1)(a)-(b), (5)(1)(2).

¹¹² *ibid*, 49.

¹¹³ *Virdee v Stewart* [2011] CSOH 50, 2011 GWD 12-271 [24] (Lady Smith); *Thomson v Mooney* [2012] CSOH 177 [12]-[14] (Lord Drummond Young); overruled [2013] CSIH 115, 2014 Fam LR 15 [7]-[10] (Lord Eassie, with whom Lord Bracadale and Lord Wheatley agreed). See also *Gibson v Gibson* unreported 4 August 2010 (Sh Ct, Peterhead), 2010 GWD 30-614 [18]; reviving a dictum in *Shilliday v Smith* 1998 SC 725 (IH) 734 (Lord Kaplan): 'The governing equitable principle is that a party ought not to be permitted to remain enriched in respect of a benefit in property or money which he has no legal rights to retain against the party from whom it derived.'

¹¹⁴ *Shilliday* (n 113) 727 (Lord Kirkwood and Lord Kaplan agreeing): '[A] person may be said to be unjustly enriched at another's expense when he has obtained a benefit from the other's actings or expenditure, without there being a legal ground which would justify him in retaining that benefit. [...] As

example, Lord Rodger's language of general principle seems to suggest at first blush that a true entitlement is required. His Lordship's opinion was, furthermore, so important in pushing Scots enrichment lawyers to analyse in terms of fact situations in which an enrichment will be unjustified (transfer, imposition, taking), rather than a list of legal grounds. This may itself distract from thinking abstractly about the latter.¹¹⁵ That may explain. But it does not justify. It cannot possibly be right that legal grounds must amount to entitlements in Scots enrichment law. Otherwise, the *condictio causa data causa non secuta*, for example, would be incomprehensible as an enrichment action.¹¹⁶ The Inner House has confirmed this view, ending any doubt.¹¹⁷

So, the response to Clive's criticism that 'enactment' or 'rule of law' as justifications for enrichments swallow everything is: this is not a concern for the Scots law of unjustified enrichment. The concept of legal ground embraces non-entitling reasons for which an enrichment might have to lie where it falls. Non-entitling statutes must, then, take their place among these reasons alongside entitling statutes.¹¹⁸ Were it not for *Transco* and *Courtney's* case, this would be a small thing. But the only authority on which the argument hangs is comparatively slender. All that can be done here is to set it out, and suggest that the point be recognised in Scotland, following its lengthier demonstration, using the more voluminous French legal sources immediately above in part III(C), and, more generally, in part III(B).

the law has developed, it has identified various situations where persons are to be regarded as having been unjustly enriched at another's expense and where the other person may accordingly seek to have the enrichment reversed.'

¹¹⁵ General evidence of this is in the leading short account of unjustified enrichment in Scotland, HL MacQueen and Lord Eassie (eds), *Gloag & Henderson: The Law of Scotland* (14th edn, W Green 2017) [24.07], giving a short list of legal grounds, at the end of which appears an example from which it requires to be presumed that statute figures among them: '[e]xamples of legal grounds justifying the retention of an enrichment are those which arise under a valid and subsisting contract, or under an unconditional gift or donation, or a benefit conferred under a trust or legacy, or a payment received as the result of an order made by a court or following a lawful taxation demand'. Specific evidence that transfer-imposition-taking thinking devalues legal grounds in themselves: N Whitty and D Visser, 'Unjustified Enrichment' in R Zimmermann, K Reid and D Visser (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (OUP 2004) 414-417 esp 414-415: 'It seems sensible to accept this time-honoured classification as the typical fact-situations in which enrichment is *prima facie* said to be *sine causa* or unjustified.'

¹¹⁶ R Evans-Jones, *Unjustified Enrichment, II: Enrichment Acquired in Any Other Manner* (W Green 2013) [3.18]-[3.30].

¹¹⁷ See, not cited by Evans-Jones, *Thomson* (n 51) [7]-[10] esp [8] (Lord Eassie, with whom Lord Bracadale and Lord Wheatley agreed); overruling the decision at first instance (n 113): 'so long as the cause in contemplation of which the enrichment was conferred is still in contemplation or still to be provided, and its accomplishment has not yet failed, the enrichment cannot be said to be *sine causa* and thus cannot be said to be unjustified'.

¹¹⁸ For entitling statutes, see *John Gunn* (n 35), mentioned above.

In *Cullen v Advocate General for Scotland*,¹¹⁹ the question was whether a statutory obligation to repay social security payments was an obligation arising from unjustified enrichment, with the result that it had prescribed in five years under the Prescription and Limitation (Scotland) Act 1973, s 6(1)-(2) and its schedule 1, paragraph 1(b). This was answered in the negative by Lord Armstrong.¹²⁰ The repayment regime was not subject to the prescription period, because it created rights and obligations which were different creatures to those created by unjustified enrichment at common law. In essence, at common law, prescription would by the time of the Outer House's decision have turned an unjustified enrichment into a justified enrichment. But the statutory regime's repayment obligation, and with it, the potential unlawfulness – one might say, the *unjustifiable character* – of the social security recipient's enrichment, was preserved. If a statute can maintain the *unlawfulness* of a given enrichment, then it should be able to maintain, *pro tanto*, the *lawfulness* of a given enrichment, too. And since, as shown above, Scots enrichment law does not require that a legal ground confer an entitlement to an enrichment, an *a contrario* reading of *Cullen* supports this chapter's argument. It is therefore open to Scots law to adopt a legal ground analysis to explain unjustified enrichment's relations with statute. As shown throughout this chapter, this approach is better than subsidiarity. The former should be embraced, and the latter dispatched, at the earliest opportunity.

CONCLUSION

This chapter first surveyed English, French, and Scots law, for claims that unjust enrichment is subsidiary to statute. Only French and Scots law and scholarship disclose findings to evaluate. English law has not considered the question specifically.

The second part of this chapter suggested that the accounts which claim that unjust enrichment is subsidiary to statute are all wrong. First, what the French and Scots law and scholarship addressed in part I of this chapter take to be rules of subsidiarity determine the existence of unjustified enrichment, an entity said to be in a relationship

¹¹⁹ *Cullen* (n 37).

¹²⁰ *ibid*, [34]-[44] esp [38], [41], [43].

of subsidiarity. Rules of subsidiarity do not do that. Secondly, the material canvassed in part I of this chapter does not admit that unjustified enrichment and statutory relief, or express or implied statutory bars to enrichment claims, can exist at the same time, such that there is never a relevant plurality of entities, required for a relationship of subsidiarity. Thirdly, the French and Scots law and scholarship addressed in part I of this chapter do not admit that unjust enrichment and statute can overlap, without the possibility of which subsidiarity is redundant. Fourthly, meta-authority is absent from all of the claims surveyed in part I of this chapter, which it cannot be, if the rules under consideration are truly rules of subsidiarity. Fifthly, the French and Scots law and scholarship surveyed see statute as somehow sovereign over unjustified enrichment – something antithetical to subsidiarity. It is conceded that this study's sixth principle of subsidiarity is not infringed. But that is only because the material discussed does not successfully surmount hurdles logically prior to its relevance.

The third part of this chapter suggests a better explanation of unjust enrichment's relations with statute. Statutory relief inconsistent with unjustified enrichment claims may apply to a given enrichment. So might statutory rules which, though they provide no relief, either expressly or impliedly approve a given enrichment. In such cases, unjust enrichment does not *exist* on the facts, because any relevant enrichment is *pro tanto* justified by statute.

CHAPTER 5

UNJUST ENRICHMENT, SUBSIDIARITY, AND PROPERTY

Previous chapters in this study provide background on the law of unjust enrichment, introduce a definition and principles of subsidiarity, and sketch the history of, and reasons for, subsidiarity in the law and scholarship on unjust enrichment. This chapter is the second to put those general chapters to use. Part I addresses arguments in the law and literature made about unjust enrichment's subsidiarity to the law of property, or property claims. After these are set out, they are tested, in part II of the chapter, against the theory of subsidiarity developed in chapter 2 of this study. It will be seen that no account surveyed can correctly be characterised as entailing unjust enrichment's subsidiarity to property. Part III of the chapter attempts better to explain the sources, such that their basic positions can be left standing without subsidiarity.

I. THE CLAIMS

This part of the chapter presents claims about unjust enrichment's subsidiarity to property in the broadly formulated rules of French law. Such claims also exist in English and French scholarship. It is suggested that Scotland is free from such arguments.

A. England

In England, and other common law jurisdictions, it is not the law that unjust enrichment is *subsidiary* to the law of property, or that unjust enrichment claims are *subsidiary* to those based on a claimant's property rights. No case puts the language to any such rule. The most developed academic account favouring unjust enrichment's subsidiarity to the law of property is in Ross Grantham and Charles Rickett's 2001 *Law Quarterly*

Review article.¹ They define subsidiarity, and the subsidiarity of unjust enrichment, as follows:²

‘Subsidiarity describes the relationship between two claims or doctrines where the scope and operation of one claim are constrained by another claim, even where all the elements of the former claim are made out. [...] Restorable or unjust enrichment [...] is subsidiary in the sense that the scope and operation of the principle of unjust enrichment are necessarily constrained by the scope and operation of the other core doctrines of the private law [...].’

One of these ‘core doctrines of the private law’ is ‘the law of property’. For unjust enrichment to operate, the authors understand that there must occur an effective transfer of wealth that vests title to an asset in the defendant, accompanied by a defect in the claimant’s subjective consent.³ From this, they say, follow two things. First, unjust enrichment supplements other private law doctrines, ‘particularly contract and property’.⁴ Only after the operation of those other areas of law can there be anything for unjust enrichment to modify: some manifestation of objective consent that transpires to be subjectively defective.⁵ The protection of persons by undoing transfers which were not truly voluntary is the concern of unjust enrichment.⁶ Under the subheading, ‘A subsidiary doctrine’, Grantham and Rickett put forward a second consequence of unjust enrichment’s essential requirements: unjust enrichment ‘has no role to play where the consequences of a defect in subjective consent are already

¹ This is used as a key example. See also, eg, John H Baker’s brief observations, explaining in terms of subsidiarity the relationship between the action for ejectment in ‘The History of Quasi-Contract in English Law’ in W Cornish and others (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) 52. One account must be mentioned due to its omission from what follows. In characteristically sensitive fashion, Lionel Smith has discussed whether subsidiarity can be used to understand the relationship between unjust enrichment and property in the common law. But, since this study addresses explicit invocations of subsidiarity, it would be wrong to impute anything objectionable to him, for his overall conclusion is that ‘[t]he common law does not know “subsidiarity” by that name, but elements of that relationship appear to be embedded in the law’: L Smith, ‘Property, Subsidiarity and Unjust Enrichment’ in D Johnston and R Zimmermann (eds), *Unjustified enrichment: key issues in comparative perspective* (CUP 2002) 619-621, 623.

² R Grantham and C Rickett, ‘On the Subsidiarity of Unjust Enrichment’ (2001) 117 LQR 273, 273.

³ *ibid*, 288, 296.

⁴ *ibid*, 289.

⁵ *ibid*, 289.

⁶ *ibid*, 290-291.

regulated, such that the restoration of the status quo ante is already provided for'.⁷ This is the subsidiarity of unjust enrichment.⁸ The authors' second illustrative example is unjust enrichment's subsidiarity to the law of property – the situation in which the claimant 'retains title to an asset that passes into the defendant's possession':⁹

'[T]he mechanism for recovery is the right, inherent in [the claimant's] title, to the wealth represented by that asset. While it is possible to describe the defendant in such a case as enriched in lay terms, as a matter of legal doctrine there is no enrichment. The defendant's receipt was always encumbered with an obligation, arising from the [claimant's] title, to return the property. That obligation means that there is nothing calling for the intervention of the law of unjust enrichment.'

The authors' claims may be summarised as follows. Unjust enrichment is subsidiary to the law of property. This is an example of the rule of subsidiarity that where the consequences of a defect in subjective consent are already provided for, unjust enrichment has no role to play. A claimant may retain title to an asset in a defendant's possession. The defendant is not enriched by the asset's value. The possession is not unjust, either.¹⁰ Unjust enrichment has no role in such a case. For Grantham and Rickett, retention of title precludes unjust enrichment.

B. France

In France, the *action de in rem verso* is a 'personal action'.¹¹ The *Cour de cassation* has held that a submission by claimants that they should 'keep [certain] bags without paying compensation was fully justified by their undisputed status as owners, which prevented their being considered as having been enriched, without legal ground, at the defendant's expense'.¹² Property precludes unjustified enrichment, therefore. For

⁷ *ibid*, 291.

⁸ *ibid*, 291, 291-293.

⁹ *ibid*, 291-292 and notes 107-108; citing, *inter alia*, *Foskett v McKeown* [2001] 1 AC 102 (HL). The language of subsidiarity is absent from that case.

¹⁰ For confirmation, see Grantham and Rickett (n 2) 292, set out in part III(A) of this chapter.

¹¹ Civ, 13 November 1912; [1912] Gaz Pal, II, 548; [1913] DP, I, 433, noted by P de Loynes.

¹² Civ, 23 April 1912; [1912] S, I, 513; [1912] Gaz Pal, I, 635: 'la prétention [des demandeurs] de conserver les sacs dont il s'agit sans payer aucune indemnité trouvait sa pleine justification dans leur

example, title prevents enrichment at one's expense, both when another benefits from one's property,¹³ and when one receives the fruits of one's property rights.¹⁴ There is clear lower court authority on the denial of unjustified enrichment when a regime for the vindication of assets is open – that is, available – though relevant pronouncements by the *Cour de cassation* appear quite oblique.¹⁵ This is perhaps because the point is seen as self-evident by French lawyers. In contrast, in situations where property claims become barred – that is, where they used to be available – under special statutory regimes, it has been clearly held, for example, that time bars (*forclusions*) on actions to recover property take *actions de in rem verso* with them.¹⁶

It seems that neither French law nor *jurisprudence* explicitly say that the *action de in rem verso* is 'subsidiary' to property law or property claims. Not to be forgotten, however, are the *Cour de cassation*'s *Clayette-Briauhant* and April 1971 formulae, the latter being replicated in truncated form in the *Code civil*'s article 1303-3. As seen in chapter 3, the language of subsidiarity has been put to all of the limbs in these sources. The 1971 formula and article 1303-3 are broad enough to encompass extant and

qualité incontestée de propriétaires, qui ne permettait pas de les considérer comme s'étant enrichis, sans cause légitime, au détriment' du défendeur.

¹³ CA Montpellier, 23 June 2016, RG n° 13/03280: 'L'action *de in rem verso* n'est pas plus recevable, la propriété des parcelles [de terre] n'ayant pas encore été transférée dans le patrimoine de la prétendue débitrice'.

¹⁴ CA Paris, 5 June 2018, RG n° 16/10684; [2018] *Juris tourisme*, n° 210, 10, noted by X Delpech: owner taking rents from lessee obtained via sublease not unjustifiably enriched at first lessee's expense due to right to fruits inherent in ownership.

¹⁵ Trib civ de Caen, 9 June 1936; [1936] *Gaz Pal*, II, 394: the sale of a film projector by a shopkeeper to a commune was nul for want of compliance with statutory formalities regulating such transactions by communes, with the result that the shopkeeper remained the owner of the machine and could bring an *action en revendication*, but not, therefore, an *action de in rem verso*, effectively to obtain the price of the sale (the mayor of the commune had offered to return the projector in any event). In the *Cour de cassation*, take first Civ, 11 February 1931; [1931] *DP*, I, 129, noted by R Savatier: owner of lost or stolen property must reimburse eventual possessor in order to recover it, but cannot then claim against intermediate possessor who duly sold property to eventual possessor, either by drawing on the vindication regime itself, or in unjustified enrichment, the sale providing a justification for the intermediate possessor's enrichment, and the only possible action against that person being delictual (unavailable on the facts for lack of fault). See also Com, 24 June 1953, *Bull civ III*, n° 240: owner of wine which the town mayor ordered four wine merchants to take and sell to the inhabitants of the town to prevent its being looted or taken by enemy troops (the facts took place in 1940) cannot claim in unjustified enrichment against the merchants because, 'by the very fact of the irregular requisition, he had an action against the mayor whose orders the merchants had only obeyed'. The action against the mayor – and, one assumes, the town – was likely vindicatory.

¹⁶ See, eg, Civ, 18-19 July 1910 (four *arrêts*); [1910] *Gaz Pal*, I, 189, 343; [1911] *DP*, I, 355; Civ, 22 February 1922; [1923] *S*, I, 153; prefigured by, eg, Trib civ de Limoges, 16 December 1904; [1905] *Gaz Pal*, I, 128. For a recent debate on *forclusion*, as against *prescription*, see N Balat, 'Forclusion et prescription' [2016] *RTD Civ* 751; F Rouvière, 'Prescription et forclusion: différence de nature ou de degré?' [2017] *RTD Civ* 529.

barred actions based on property rights. It should further be noted that statutory actions – which may be designed to vindicate property rights – have explicitly been included in subsidiarity formulae by the courts.¹⁷ It is reasonable to say that, in French law, the claim exists that the *action de in rem verso* is subsidiary to any *available* property-based action, or one which is *barred* by obstacle of law, such as prescription.

Specific claims about unjust enrichment's subsidiarity to property actions are found in French scholarship.¹⁸ When sole author of his well-known *Traité élémentaire*, Marcel Planiol maintained that the *action de in rem verso* should be called the '*condictio sine causa*, because it is nothing other than a *condictio* subsidiary to vindication and replacing the real action, when it becomes impossible because the thing claimed has been mixed, though still exists as value in the possessor's patrimony'.¹⁹ Planiol would probably have accepted, with the *Cour de cassation*, that retention of title to an asset prevents unjustified enrichment. This quoted observation survived, alongside a more general one about the *action de in rem verso*'s subsidiary character, into the *Traité*'s continuation by both Planiol and Georges Ripert.²⁰ It is gone from a later edition by

¹⁷ As seen in chapter 4. Recall the following statements. 'Mais attendu que l'action *de in rem verso* ne doit être admise que dans les cas où le patrimoine d'une personne se trouvant enrichi au détriment de celui d'une autre, celle-ci ne jouirait, pour obtenir ce qui lui est dû, d'aucune action naissant d'un contrat, quasi-contrat, délit, quasi-délit ou de la loi [...]': Civ, 29 January 1951, *Bull civ I*, n° 34, also mentioning the 'caractère subsidiaire' of the action. See, previously, but introducing statute differently, CA Paris, 21 April 1937; [1937] *Gaz Pal*, II, 426: the *action de in rem verso* 'est subsidiaire et ne peut être exercée lorsque le demandeur peut obtenir satisfaction par une autre action naissant d'un contrat, d'un quasi-contrat ou d'un délit, ou a omis d'exercer, pour la sauvegarde de ses droits, une autre action que la loi mettait à sa disposition'.

¹⁸ Against is CP Filios, *L'enrichissement sans cause en droit privé français* (Bruylant 1999) no 542, but only in relation to the classic action for vindication of stolen corporeal moveables. This, he says, technically has no statutory base and is actually modelled on the *condictio indebiti*. Even if correct, this is a weak argument. Other vindicatory actions in France are clearly based in legislation (see, eg, *Code de la propriété intellectuelle*, arts L612-16 - L612-7), to which most authors, if asked, would probably say that unjustified enrichment is subsidiary. (The provisions referred to here concern the vindication of a priority over previously granted patent.)

¹⁹ M Planiol, *Traité élémentaire de droit civil*, vol II (3rd edn, LGDJ 1905) no 935: 'Avec un peu plus de science du droit romain, on lui aurait donné le nom de *condictio sine causa*, car elle n'est pas autre chose qu'une *condictio* subsidiaire à la revendication et remplaçant l'action réelle, lorsque celle-ci est devenue impossible parce que la chose réclamée a perdu son individualité, tout en figurant encore en valeur dans le patrimoine du possesseur.' This appears without reference to Roman law, with a slightly different ending, in *Traité élémentaire de droit civil*, vol II (9th edn, LGDJ 1923) no 935.

²⁰ M Planiol and G Ripert, *Traité élémentaire de droit civil*, vol II (11th edn, LGDJ 1931) nos 935, 937; the latter paragraph citing, *inter alia*, Civ, 12 May 1914; [1914] *D Chron* 56; [1914] *Pandectes*, *Bull somm*, I, 86; [1918] *S*, I, 41, noted by E Naquet; Civ, 2 March 1915; [1915] *S*, *Bull somm*, I, 20; [1920] *DP*, I, 102 (first case).

Ripert and Jean Boulanger, and so this editorial duo is not taken to make the claim under discussion.²¹

Other commentators link subsidiarity, the *action de in rem verso*, and property actions. Discussing subsidiarity, Louis Josserand said: 'whoever can vindicate, cannot sue for restitution of enrichment'.²² André Rouast,²³ and Gabriel Marty and Pierre Raynaud, put it similarly briefly.²⁴ A more developed, though still short, account, is in the *Leçons de droit civil* by the brothers Mazeaud. Under the subheading of '*le caractère de subsidiarité de l'action « de in rem verso »*', the *Cour de cassation's* Clayette-Briauhant and April 1971 formulae are applied thus: 'the existence of actions designed to vindicate property rights, also bars the action « *de in rem verso* »'. And commenting on the manifestation of subsidiarity involving the prescription of an action, it is said that 'the *action de in rem verso* cannot be used to circumvent the rules of [ex] article 2279' of the *Code civil*, on the action for the return of stolen corporeal moveables with a three-year prescription period.²⁵ So the *Leçons* would forbid an *action de in rem verso* if a *vindicatio* were available, or barred by an obstacle of law. It is important to notice, with Planiol, above, and two other authors,²⁶ that once property to which title is retained 'has been mixed', a *vindicatio* is impossible, but this does not take the *action de in rem verso* with it. In modern language, this might be explained on the basis that an *obstacle of fact*, not law, is what blocks the enrichment action.

²¹ This duo accepts that unjust enrichment must not interfere with the rest of the legal system, and that 'it is in this sense that the action has been called *subsidiary*', but remarks that 'the expression is bad, precisely because there is no subsidiarity': G Ripert and J Boulanger, *Traité de droit civil d'après le traité de Planiol*, vol II (5th edn, LGDJ 1957) nos 1268, 1286 (original emphasis): 'Il ne faut pas faire appel à la notion générale d'enrichissement sans cause pour tenter de corriger les rapports juridiques qui peuvent avoir pour effet l'enrichissement de l'une des parties ou de causer l'appauvrissement d'une autre [...]. C'est en ce sens que l'action a été dite *subsidaire*. Mais l'expression est mauvaise, car justement il n'y a pas de subsidiarité.'

²² L Josserand, *Cours de droit civil positif français*, vol II (3rd edn, Sirey 1939) no 574 (original emphasis): 'l'action *de in rem verso* a un caractère *subsidaire* [...] qui peut revendiquer, ne saurait agir en récupération d'enrichissement'.

²³ A Rouast, 'L'enrichissement sans cause et la jurisprudence civile' [1922] RTD Civ 35, 83-84; approved by F Goré, *L'enrichissement aux dépens d'autrui* (Dalloz 1949) 315-316.

²⁴ G Marty and P Raynaud, *Droit civil: Les obligations*, vol I (2nd edn, Sirey 1988) no 398. In a footnote, the authors say that the terminology of subsidiarity 'is criticised, however, because that which is subsidiary in [legal] procedure is not necessarily excluded by the principal' ('le subsidiaire en procédure n'est pas nécessairement exclu par le principal'). The authors' views were long-held. See *Droit civil: Les obligations*, vol I (1st edn, Sirey 1962) no 354.

²⁵ F Chabas (ed), *Leçons de droit civil de H, L et J Mazeaud*, vol II/1 (9th edn, Montchrestien 1998) nos 706, 708 (emphasis altered). See now *Code civil*, art 2276.

²⁶ R Demogue, *Traité des obligations en général*, vol III (LNDJ 1923) no 82 *in principio*, but without linking this in any way to the subsidiarity of the action *de in rem verso* to the *vindicatio*, discussed later, no 175; N Almosnino, *Le caractère subsidiaire de l'action de in rem verso* (LGDJ 1931) 124-126.

The *jurisprudence* and *doctrine* surveyed here may be summarised as follows. The retention by a claimant of title to an asset in a defendant's possession precludes any question of a personal action in unjustified enrichment. A *vindicatio* is available to the claimant in such a case. An open *vindicatio* bars an *action de in rem verso*. A *vindicatio* may become time-barred, prescribe, or (by extension) be blocked by another obstacle of law. If this occurs, any *action de in rem verso* is barred in turn.

C. Scotland

Turning to Scotland, Robin Evans-Jones thinks that 'in practice an enrichment claim may be raised in circumstances in which, in law, all that is at stake is whether [the defendant] should reconvey detention or legally protected possession or the extent of the enrichment that was derived from physical possession of property'.²⁷ He does not, however, use the language of subsidiarity to *deny* that unjustified enrichment is subsidiary to the law of property. His is not a claim about subsidiarity. In enrichment by transfer cases, Niall Whitty says that 'that there is no overlap of the causes of action' in unjustified enrichment and vindication, 'and that therefore subsidiarity cannot arise'.²⁸ Whitty also rejects the potential subsidiarity to property claims of those based on enrichment by the act of the party enriched. But he sets up a straw man in the form of a case which contains obiter remarks to the effect that enrichment came after contractual and property remedies – for the decision does not mention subsidiarity at

²⁷ R Evans-Jones, *Unjustified Enrichment, I: Enrichment by Deliberate Conferral: Condictio* (W Green 2003) [1.94].

²⁸ N Whitty, 'Transco Plc v Glasgow City Council: Developing Enrichment Law after Shilliday' (2006) 10 Edinburgh L Rev 113, 129-130 and note 100; citing K Reid, 'Unjustified Enrichment and Property Law' [1994] JR 167, 169.

all.²⁹ In sum, Scots law and scholarship do not appear to contain significant positive claims about unjustified enrichment's subsidiarity to property.³⁰

II. ANALYSIS OF THE CLAIMS

In this second part of the chapter, the claims set out above are analysed. The framework for discussion is the principles of subsidiarity developed in chapter 2 of this study. The background is the conditional nature of subsidiarity, also developed in chapter 2, and both the law of unjust enrichment, and the general question of its subsidiarity, surveyed in chapters 1 and 3. Since France is the only jurisdiction with law (and *jurisprudence*) on point, its material will be considered first under each subheading, before England and Scotland.

A. Existence

Once in place as an operative rule or principle, subsidiarity is not concerned to determine whether a given entity to which it applies actually exists. To be a rule of subsidiarity, it would seem necessary for a rule to create, maintain, or put an end to, a relationship of subsidiarity between entities. For a rule to destroy one or more of the

²⁹ In *City of Glasgow DC v Morrison McChlery & Co* 1985 SC 52 (IH); cited by Whitty (n 28) 129-130 and note 107, the council's appeal against the Sheriff's dismissal of its action for recompense was refused for irrelevancy, because there had been a lease between the parties: the council had failed properly compulsorily to purchase the company's interest. But the Inner House agreed that, even if the council had succeeded, applying the special and strong circumstances test in *Varney (Scotland) Ltd v Lanark Burgh Council* 1974 SC 245 (IH), the other remedies available to the council would have rendered it unable to claim for recompense: *Morrison McChlery*, 64 (the Lord-Justice Clerk [Wheatley], with whom Lord Dunpark agreed), 68 (Lord Hunter). In so holding, Lord Wheatley agreed with Morrison that 'if the appellants were correct in maintaining that the tenants' interest under the lease had passed to them, and that the respondents had remained in possession of the tenancy until its expiry in due term and by tacit relocation thereafter for the period condescended upon, the appellants had various remedies available to them to protect their interests. For instance, they could have entered into a new lease with the respondents with a new rental; they could have taken an action for removing if the respondents refused to move; they could have pursued an action against the respondents for violent profits.' If there had been a *tacit relocation* of the lease, then a lease would always have subsisted between the parties: there could have been no claim for recompense in any event, as Morrison's enrichment (via occupation of the premises) would have been justified.

³⁰ Some examples illustrating the application of Eric Clive's rule eleven, on subsidiarity, bar an unjustified enrichment action when there is a remedy in property law: *Draft Rules on Unjustified Enrichment and Commentary – Appendix to Scottish Law Commission Discussion Paper No 99* (HMSO Scot 1994) 89-90. But they all undo themselves. Clive's examples 6-8 and 10 presuppose that there is no *enrichment* to redress; examples 9 and 11 presuppose that the relevant enrichment is not *unjustified*; and in example 12, an enrichment action is allowed, despite the fact that Clive accepts that there is no enrichment if title to the asset transferred is retained by the pursuer. For these reasons, it would be unfair to subject Clive's account to any scrutiny.

entities the interaction of which it is supposed to manage might be thought to prevent it from carrying out these functions in relation to that entity. It would also seem to deal with a question of overlap in a less than conditional manner. And as argued in chapter 2, subsidiarity is an inherently *conditional* idea. Once an entity does not exist, there is no way for it eventually to become competent. Here, the relevant entities are, on one side, the law of property and property claims, and on the other, the law of unjust enrichment and unjust enrichment claims. None of the above English and French claims satisfies the instant principle of subsidiarity.

In French law, the supposed subsidiarity of the *action en enrichissement injustifié* is now confirmed by the *Code civil*'s article 1303-3. This rule is what determines the action's existence in the face of an available or legally barred *vindicatio*.³¹ It says that the claimant 'has no action' in such a case. So whatever it is, it cannot be a rule of subsidiarity. The same argument applies to the academic statements putting the language to a rule according to which the mere (non-)existence of a *vindicatio* bars an *action de in rem verso*.

According to Grantham and Rickett's account, there is a rule that unjust enrichment has no role where the restoration of the *status quo* prior to a defect in subjective consent is already provided for, and it is a rule of subsidiarity. A specific application of this rule of subsidiarity is that unjust enrichment has no role to play where the claimant's title provides for the relevant restoration. At neither level of generality can subsidiarity be at play here. The rule determines the existence of any unjust enrichment claims when title to an asset is retained.

B. Plurality

A relationship of subsidiarity positively requires the existence of at least two entities, or groups of entities. Without a plurality of entities, no relationship would be possible at all in a given context, and whatever authority existed in that context would lie unconditionally with the only relevantly extant entity. None of the above English and

³¹ The partial exception to the obstacle of law bar, for *negotiorum gestio* in the *Code civil*, art 1303-5, makes no difference to the basic principle here. This issue is discussed further in chapter 9.

French claims satisfies this principle. This is because on none of the accounts can unjust enrichment and property, or enrichment claims and property claims, co-exist. Entities which do not co-exist cannot be in a relationship of subsidiarity.

In French law, and for the commentators above who favour subsidiarity in the context under discussion, the existence of an open vindicatory action means that there can be no *action en enrichissement injustifié*. The same is true when the former action is legally barred. In neither situation will more than one action relevantly exist. One thing cannot be in a relationship with another thing if one of those things does not exist. An enrichment claim cannot be subsidiary to a property claim if the former does not exist.

On Grantham and Rickett's account, if property provides 'the mechanism for recovery', then there is never any unjust enrichment: there is no enrichment, and whatever happens is not unjust, they say. Where property exists, unjust enrichment does not. They are not talking about the latter's subsidiarity to property here. There can be no relationship of subsidiarity between enrichment and property on the envisaged facts, because the doctrines would have to be capable of co-existing for that to be possible. Grantham and Rickett define subsidiarity as a 'relationship between *two* claims or doctrines' (emphasis added). Their enrichment-property example does not comply with their own definition.

C. Overlap

For a rule of subsidiarity to be relevant in any context, at least two entities in that context must be capable of overlapping if unrestrained. Otherwise, there would be nothing for a conditional rule of subsidiarity to do. None of the above English and French claims satisfies this principle.

As in chapter 4, this is a short point. If none of the accounts above admits that enrichment and property can co-exist, then none of them admits that they might overlap – that is, concur. If none admits that, then none leaves any role for subsidiarity. Accounts which leave no role for subsidiarity cannot sensibly be said to be about subsidiarity.

D. Meta-authority

For a rule of subsidiarity definitively to resolve questions of allocation and overlap, it must bind the relevant entities by constituting an independent, higher authority in relation to them. If this were not so, and the relevant entities could manage their relations without an independent, higher, organising rule (as, for example, would be the case if one of them were sovereign and could dictate any relevant interactions), there would be no need for subsidiarity. This is subsidiarity as meta-authority. A rule of subsidiarity is what dictates whether the entities to which it applies have competence or authority, however they might behave if unrestrained. And the condition, howsoever framed, on which allocation takes place, goes to the general essence of subsidiarity. None of the above English and French claims satisfies the instant principle.

The rule in article 1303-3 of the *Code civil* is not a meta-authority in relation to the *action en enrichissement injustifié* or property actions. It is placed in the chapter of the *Code* on the enrichment action, of which it is an ‘inherent condition’.³² So the rule is not sourced independently of the *action de in rem verso*, one of the entities to which it is supposed to apply. And it does not actually govern any potential property action which might come under its formula, either. It works by making the *action en enrichissement injustifié* disappear in the face of a property claim, whether open or legally barred. The property claim decides for itself, so to speak, what it is, or is not, going to do, and there is nothing in article 1303-3 that can change that. French commentary referred to above also appears to accept that subsidiarity is part of the *action de in rem verso*. This suffices to declare all of it incorrect on the meta-authority point. Rules which are not independent, and cannot actually govern the things to which they apply, are not rules of subsidiarity.

³² See Civ 1re, 4 April 2006, pourvoi n° 03-13986, *Bull civ I*, n° 194; [2006] RLDC, n° 28, 11, observations by S Doireau: ‘le caractère subsidiaire reconnu à l’action fondée sur le principe de l’enrichissement sans cause ne constitue pas une fin de non recevoir au sens de l’article 122 du nouveau Code de procédure civile mais une condition inhérente à l’action’; CA Rennes, 18 December 2007, RG n° 06/00867; CA Nîmes, 8 January 2008, RG n° 04/01413; CA Basse-Terre, 5 January 2009, RG n° 05/01889; CA Douai, 26 October 2009, RG n° 08/06633; CA Limoges, 4 March 2013, RG n° 12/00560; CA Metz, 21 September 2017, RG n° 17/00339.

Grantham and Rickett say that ‘subsidiarity is not merely a consequence of unjust enrichment’s inherent doctrinal nature, but also reflects the ordering of private law in the common law system’.³³ Since it is partially sourced in unjust enrichment itself, what they see as the subsidiarity of unjust enrichment to property is not independent or sourced on a higher plane than at least one of the entities to which it is supposed to apply. It is not subsidiarity at all.

E. Not sovereignty

For a relationship of subsidiarity to exist, no entity said to be part of that relationship can be sovereign over any other entity in that relationship. In such a situation, there would be nothing for subsidiarity to do, because authority in that context would be allocated *unconditionally*. This goes against the essence of subsidiarity – as argued in chapter 2, subsidiarity is a *conditional* idea. None of the above English and French claims satisfies the instant principle.

This is another short point. On all of the above accounts, whenever property exists, it always wins against unjust enrichment, so to speak. There is no condition. There is no doubt. In French law, article 1303-3 of the *Code civil* confirms that there is no *enrichissement injustifié* on the field on which property is at play, or was, until itself barred by an obstacle of law. Commentators accept this, too. And Grantham and Rickett’s definition of subsidiarity specifically says that ‘unjust enrichment [...] is subsidiary in the sense that the scope and operation of the principle of unjust enrichment are necessarily constrained by the scope and operation of the other core doctrines of the private law’. One of these doctrines is property law, they say.³⁴

In sum, the accounts surveyed here entail that, in some way, property is *sovereign* over unjust enrichment. So whatever unjust enrichment is to property, it cannot be subsidiary to it.

³³ Grantham and Rickett (n 2) 293.

³⁴ *ibid*, 273.

F. Not concurrence

An extant relationship of subsidiarity is incompatible with the free concurrence of the entities said to be part of that relationship. Conditionality would be absent in such a situation, since competence would not be ordered in any way at all. The whole point of subsidiarity is to prevent concurrence which is happening, or might happen, as argued in chapter 2.

As noted under subheadings B, C, and D, of this part of the chapter, the accounts discussed here do not admit that unjust enrichment and property can co-exist, or concur when not restrained by a meta-authority. They do not, therefore, breach the instant principle of subsidiarity. This is only a small consolation, of course, since if there is no concurrence to prevent, subsidiarity is redundant, assuming that it is correct to say that subsidiarity exists in the first place, which, on the accounts here surveyed, it does not.

III. RE-ANALYSIS OF THE CLAIMS

This third part of this chapter argues that, on the accounts surveyed above, subsidiarity is both impossible and redundant.

A. Grantham and Rickett

For these authors, unjust enrichment is subsidiary in the sense that, where the consequences of a defect in subjective consent are already provided for, unjust enrichment has no role to play. Unjust enrichment is subsidiary to the law of property where a claimant retains title to an asset in a defendant's possession. The defendant is not enriched by the asset's value. The possession is not unjust, either.³⁵ Unjust enrichment has no role in such a case. For Grantham and Rickett, retention of title precludes unjust enrichment. Since we are dealing with a lone academic account, a short detour into the authorities is warranted to see to what extent this is accurate.

³⁵ For confirmation, see *ibid* 292, set out below in this section of this part of the chapter.

The question whether, in English law, retention of title does indeed prevent unjust enrichment, is most controversial.³⁶ As to rights in intangible property, to which the tort of conversion does not apply,³⁷ the speech of Lord Browne-Wilkinson, who agreed with Lord Millett, and the speech of Lord Millett himself, in *Foskett v McKeown*,³⁸ can be read as answering that question positively, whilst Lord Hoffmann's agreement with Lord Millett on this point is general enough to encompass the relevant part of the latter's speech. In *Menelaou v Bank of Cyprus UK Ltd*,³⁹ the Supreme Court subsequently held that there is a distinction 'in principle' between claims to vindicate property rights and in unjust enrichment by reference to *Foskett*. Though their Lordships did not specifically discuss the issue addressed in this paragraph, there are telling pinpoint references to Lord Browne-Wilkinson's and Lord Hoffmann's *Foskett* speeches, and to one in Lord Millett's, where his Lordship referred back to his own earlier, more relevant remarks.⁴⁰ A noted first instance case also reads the authorities, including *Foskett*, and *Lipkin Gorman v Karpnale Ltd*,⁴¹ as holding that the retention of either legal and equitable property rights in an asset, tangible or intangible, prevents the existence of unjust enrichment.⁴² It is suggested that as a matter of decided authority, the explanation for this is that, whilst a person may be enriched by an asset

³⁶ For summaries of the debate, and contrary views, see A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 194-198; C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [8-12]-[8-26], [8-96]-[8-103].

³⁷ *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1 [97]-[107] (Lord Hoffmann), [271] (Lord Walker), [321]-[322] (Lord Brown); *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] QB 41 esp [13]-[15] (Moore-Bick LJ, with whom Davis and Floyd LJ agreed). Where, under the Torts (Interference with Goods) Act 1977 (Eng and NI), s 3(2)(b)-(c), a claimant elects for damages representing the value of the goods, or the defendant elects to pay such damages instead of delivering up the goods, title to the goods passes to the defendant on satisfaction of the judgment. See *Ellis v John Stenning and Son* [1932] 2 Ch 81 (Ch) esp 96-97 (Luxmoore J); cited, with other authority, by M Bridge and others, *The Law of Personal Property* (2nd edn, Sweet & Maxwell 2018) [32-052], note 411, who comment that '[d]amages in conversion are not so much designed to compensate the claimant for loss suffered, as to fix the price for a forced judicial sale of the asset.' This might also tend to suggest a positive answer to the question addressed in this paragraph.

³⁸ *Foskett* (n 9) 108, 110 (Lord Browne-Wilkinson), 115 (Lord Hoffmann), 127, 129 (Lord Millett).

³⁹ [2015] UKSC 66, [2016] AC 176 [37] (Lord Clarke, with whom Lord Kerr and Lord Wilson agreed).

⁴⁰ The most important references are to Lord Millett's remarks in *Foskett* (n 9) 127: *Menelaou* (n 39) [98] (Lord Neuberger, with whom Lord Clarke and Lord Kerr agreed), [108] (Lord Carnwath).

⁴¹ [1991] 2 AC 548 (HL).

⁴² *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156 [63], [71]-[76], [83], [95] (Stephen Morris QC, sitting as a Deputy High Court Judge); noted by L Chambers and C Buckingham, [2013] LMCLQ 296.

to which it holds title,⁴³ such enrichment is not unjust for the purposes of the law of unjust enrichment.⁴⁴

‘The transmission of a claimant’s property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. *There is no “unjust factor” to justify restitution* (unless “want of title” be one, which makes the point).^[45] The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment.’

Grantham and Rickett agree:⁴⁶

‘[I]f at the moment of transfer, the law or the parties have already provided for restoration in the event of the plaintiff’s subjective consent being defective, the conditions which would otherwise call unjust enrichment into play do not arise. In such cases, the presence of a mechanism to restore the *status quo ante*, which encumbers the enrichment, *denies the possibility* both that the defendant is enriched and *that such enrichment is unjust*.’

If an enrichment is not unjust, there can be no unjust enrichment. If that is what is happening on a given set of facts, there is an explanation for why unjust enrichment has no role to play, but no unjust enrichment to be subsidiary to anything else. And if

⁴³ It may be incorrect simply to say that, according to English law, there is no enrichment at all when (i) title to (ii) an asset are with the same person, where, for example, a solicitors’ firm receives money from a client and holds it on trust for the benefit of a third party beneficiary – a creditor, to be paid over by way of unrestricted loan, *pace* the court in *Bellis v Challinor* [2015] EWCA Civ 59, [2016] WTLR 43 [79], [92], [114] (Briggs LJ, with whom Underhill and Moore-Bick LJJ agreed). To say that the firm is not in those circumstances enriched perhaps ignores the increase in the balance of its client account – the debt in its favour against its bank – to which it holds legal title. It may be possible to view both receipt and retention of this enrichment as justified by the legal title to the monies obtained when the trust over them arises.

⁴⁴ *Foskett* (n 9) 127 (Lord Millett, emphasis added); set out but not elaborated upon in *Armstrong* (n 42) [81] (Stephen Morris QC, sitting as a Deputy High Court Judge); and referred to by page number but not discussed in *Menelaou* (n 39) [98] (Lord Neuberger, with whom Lord Clarke and Lord Kerr agreed), [108] (Lord Carnwath).

⁴⁵ Looking at things in a different way, and following more recent developments, want of *authority* might, now, ‘be one’, in Lord Millett’s words: *Great Investments Ltd v Warner* [2016] FCAFC 85, (2016) 243 FCR 516 [52]-[69] (Jagot, Edelman and Moshinsky JJ). In that case, it was held proper to concede that the transfer of company assets without authority gave rise to strict liability claims to specific and for-value restitution. A contract did not cover the unauthorised transfer on the facts. But the court further explained that, if one *were* to, restitution could follow rescission of such a contract, such that, in particular no question of knowing receipt would arise.

⁴⁶ *Grantham and Rickett* (n 2) 292, emphasis added.

a lack of injustice is what means that unjust enrichment does not operate on a given set of facts, there is no need for subsidiarity. On Grantham and Rickett's own account, subsidiarity is both impossible and redundant.

B. French law

The view that retention of title to an asset is incompatible with the unjustified enrichment of the title holder is fully embedded in the French law and voluminous academic commentary, surveyed above, in part I(A) of this chapter. So it is unnecessary to address any more material. It is simply submitted that the same analysis as was put forward of Grantham and Rickett's account applies to the French sources.

C. Scots law

It was established above that neither Scots law nor scholarship claims that unjustified enrichment is subsidiary to the law of property. However, it appears that, as a matter of decided authority, title to an asset precludes *pro tanto* the unjustified enrichment of the title holder. There is no injustice in wealth held pursuant to property rights. So, where a house was sold pursuant to proper missives, and an unenforceable agreement as to a supplementary payment on subsequent resale went unsatisfied, it was said:⁴⁷

'[T]he right upon which the defenders now rely, namely to retain for themselves the whole free proceeds of sale of the property, is derived from their ownership of the property which in turn is derived from the terms of the missives for the sale to them of the property by the pursuer in August 2006. In these circumstances the defenders' enrichment can in my opinion indeed be seen to have been entirely justified.'

⁴⁷ *Gibson v Gibson* unreported 4 August 2010 (Sh Ct, Peterhead), 2010 GWD 30-614 [16] (Sheriff Principal Sir Stephen Young QC). See also *Crewpace Ltd v French* [2011] CSOH 133, 2012 SLT 126 [46] (Morag Wise QC): '[I]f the defenders are enriched, they are so enriched by selling or leasing their own land. Enrichment is usually only unjustified when its retention cannot be supported by a legal ground.' All this presumes that the basis of the transaction subsists. See *McKenzie v Nutter* 2007 SCLR 115 (Sh Ct, Dumfries and Galloway) [37]-[38] (Sheriff Principal Lockhart).

The same analysis as has been applied to the English and French sources in this part of the chapter holds good again. Any claim that unjustified enrichment in Scotland is subsidiary to the law of property cannot get off the ground. But the basic position argued for in the law and scholarship remains.

CONCLUSION

This chapter first surveyed English, French and Scots law for claims that unjust enrichment is subsidiary to property. It highlighted only one serious academic account to that effect in England, before discussion of the more extensive French sources, which lend themselves plausibly to the claim of subsidiarity. Scots law and scholarship do not claim that unjust enrichment is subsidiary to property.

The second part of this chapter suggested that the English and French accounts which claim that unjust enrichment is subsidiary to property are all wrong. First, what they take to be rules of subsidiarity determine the existence of unjust enrichment, an entity said to be in a relationship of subsidiarity. Rules of subsidiarity do not do that. Secondly, they do not admit that unjust enrichment and property can exist at the same time, such that there is never a relevant plurality of entities, required for a relationship of subsidiarity. Thirdly, they do not admit that unjust enrichment and property can overlap, without the possibility of which subsidiarity is redundant. Fourthly, they do not see their rules of subsidiarity as meta-authorities, which they must be if they are to be rules of subsidiarity. Fifthly, they all see property as somehow sovereign over unjust enrichment – something antithetical to subsidiarity. It is conceded that no account breaches this study's sixth principle of subsidiarity. But that is only because none successfully surmounts hurdles logically prior to its relevance.

The third part of this chapter showed that the side-lining of unjust enrichment when property is at play, envisaged in the material addressed, can stand. However, the sources adopt positions which are both incompatible with subsidiarity and render it redundant.

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CHAPTER 6

UNJUST ENRICHMENT, SUBSIDIARITY, AND CONTRACT

Previous chapters in this study provide background on the law of unjust enrichment, introduce a definition and principles of subsidiarity, and sketch the history of, and reasons for, subsidiarity in the law and scholarship on unjust enrichment. This chapter is the third to put those general chapters to use. Its first part addresses arguments in the law and literature made about unjust enrichment's subsidiarity to the law of contract, or contract claims. In the second part of this chapter, these arguments are tested against the theory of subsidiarity developed in chapter 2 of this study. It will be seen that no account surveyed can correctly be characterised as entailing unjust enrichment's subsidiarity to contract. The third part of this chapter attempts to present a better, subsidiarity-free understanding, of unjustified enrichment's relations with contract.

I. THE CLAIMS

This part of the chapter presents claims about unjust enrichment's subsidiarity to contract. They are found in law and scholarship in both France and Scotland. They also exist in English scholarship.

A. England

In England, and other common law jurisdictions, it has not been claimed in the cases that unjust enrichment is *subsidiary* to the law of contract, or contract claims. The only common law cases to use the language have done so in this context.¹ But, as explained in chapter 3, they do not make a true claim about subsidiarity. For claims about unjust enrichment's subsidiarity to contract, we must look to the scholarship. Three accounts are described here as illustrative examples.²

¹ Recall, eg, *Nikolic v Oladaily Pty Ltd* [2007] NSWCA 252 [101] (Mason P, Campbell JA, and Handley AJA).

² For other claims, unaddressed in detail in this study, see *Restatement (Third) of Restitution and Unjust Enrichment* (ALI 2011) §2, cmt a; W Swain, *The Law of Contract 1670-1870* (CUP 2015) 136, explaining a case as having held that 'the non-contractual action was subsidiary to the action in contract', though no such language appears in the judgment. See *Cutter v Powell* (1795) 6 Term Rep 320; 101 ER 573 (KB).

Ross Grantham and Charles Rickett claim that unjust enrichment is subsidiary to the law of contract in their 2001 *Law Quarterly Review* article. Their account is discussed in previous chapters. One of 'the other core doctrines of private law' which, for Grantham and Rickett, constrain the 'scope and operation' of unjust enrichment, is 'consent-based obligations (dominantly but not solely the law of contract)'.³ As to the subsidiarity of unjust enrichment to contract, the authors say that unjust enrichment's lack of role appears 'most obviously the case where the parties have dealt with the matter by express agreement'.⁴

'Thus, for example, where the parties have agreed that if, in making payment, the assumptions upon which the plaintiff paid later turn out to have been mistaken, the defendant will return the payment, the doctrinal basis for restoration of the payment to the plaintiff is the express agreement, not the law of unjust enrichment. [...] This conclusion, furthermore, does not turn merely on some ill-defined hierarchical notion of the primacy of contract, but rather on the simple fact that, since the parties have already provided for the possibility of restoration if the plaintiff's subjective consent was defective, there is no longer any call for the intervention of the law of unjust enrichment. The agreement means that it is no longer the case that, but for the imposition of a restitutionary obligation, the defendant would be able to retain an enrichment in circumstances that make it unjust to do so.'

The authors' claims may be summarised as follows. Unjust enrichment is subsidiary to the law of contract. This is an example of the rule of subsidiarity that where the consequences of a defect in subjective consent are already provided for, unjust enrichment has no role to play. Parties may choose to do this by contract. If they do, any enrichment which takes place under the contract will not be unjust. Grantham and

³ R Grantham and C Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 LQR 273, 273.

⁴ *ibid*, 291 and note 105; citing *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161 (HL). As explained in chapter 3, this case says nothing about subsidiarity at all. Importantly, the vocabulary is absent from Lord Goff's dictum *ibid*, 164, about the 'contractual regime which legislate[d] for the recovery of overpaid hire' by the owner of a ship, and not the assignee of the right to hire, which denied unjust enrichment any 'part to play', and rendered 'the imposition by the law of a remedy in restitution both unnecessary and inappropriate'.

Rickett's work has been criticised,⁵ but also cited with approval in the subsidiarity to contract context.⁶

In his *Restatement*, Andrew Burrows explains 'the general subsidiarity of unjust enrichment to the law of contract',⁷ one element of which is that '[i]n general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual [...] obligation'.⁸ The second element is that 'a defendant has a defence [to an unjust enrichment claim] if the defendant's liability is excluded (in whatever terms) by a contract [...]'.⁹ The third element is that '[t]he defendant has a defence [to an unjust enrichment claim] if (a) there has been a [...] contract of compromise which dealt with the unjust enrichment and has not been [...] set aside [...]'.¹⁰ It should be noted that Burrows sees no problem with concurrent liability in contract and unjust enrichment. This he does not link to subsidiarity, and subjects it only to a rule against double recovery.¹¹

In chapter seven of his book, on 'Lawful bases' for enrichments, Graham Virgo says that unjust enrichment is subsidiary to contract. Under sole reference to Grantham and Rickett, Virgo states:¹²

⁵ For scepticism about their subsidiarity, see C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [2-02]-[2-04]. For a lighter note of caution, see G Jones (ed), *Goff & Jones: The Law of Restitution* (7th edn, Sweet & Maxwell 2007) [1-061], note 78.

⁶ Apart from in Graham Virgo's work, discussed below, see R Havelock, 'Anticipated Contracts That Do Not Materialise' [2011] RLR 72, 73 and note 19; R Havelock, 'The Valuation of Enrichment in the Supreme Court' [2013] RLR 97, 97 and note 176; R Havelock, 'A Taxonomic Approach to Quantum Meruit' (2016) 132 LQR 470, 476 and note 49; all citing Grantham and Rickett (n 3) esp 273-274. None of the authorities cited by Havelock in his articles for the proposition that unjust enrichment is subsidiary to the law of contract uses that language.

⁷ A Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 151.

⁸ Burrows, *Restatement of Unjust Enrichment* (n 7) §3(6) and commentary, 32-35. The section also mentions statute and other legal obligations. Cf *ibid*, 91-92, considering the possibility of conceptualising the exclusion of liability in unjust enrichment by contract (see *ibid*, §32 and commentary, 150-152) as preventing unjust enrichment from arising in the first place. See also A Burrows, 'Good Consideration in the Law of Unjust Enrichment' (2013) 129 LQR 329, 331: 'The importance of a mistaken payment being made for good consideration is not that this constitutes a defence but that this means that the payment is being made under a contract so that, unless the contract is invalid, there is no prima facie right to restitution.'

⁹ Burrows, *Restatement of Unjust Enrichment* (n 7) §32. The section also mentions statutory exclusion.

¹⁰ *ibid*, §29(a). The section also mentions unreversed court judgments.

¹¹ 'A right to restitution for unjust enrichment may be claimed concurrently with another claim (for example, for a tort or breach of contract) but satisfaction of more than one claim is not permitted where it would produce double recovery': *ibid*, §1(4) and commentary, 28-29; citing *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 (HL), which approves concurrent liability in contract and tort.

¹² G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 133-134 and note 5; citing Grantham and Rickett (n 3). See, previously, G Virgo, *The Principles of the Law of Restitution* (2nd edn,

‘If the parties have entered into a valid agreement which is to regulate their relationship it is vital that the law of unjust enrichment does not undermine what they have decided. It is only where the agreement does not operate, or has ceased to operate, that the law of unjust enrichment should have a role to play in any dispute between the parties. Consequently, the law of restitution should be considered to be subsidiary to the law of contract.’

B. France

As shown in chapter 3, article 1303-3 of the *Code civil*, and the *Cour de cassation*’s formulae from which it derives, are claims or rules about the subsidiarity of the *action de in rem verso* in France. Though they do not themselves use the language of subsidiarity, many *other* sources, referred to earlier, do put it to the now-codified rules. Article 1303-3 encompasses open or legally barred contractual actions, and holdings in the courts mention contract specifically.¹³

To this general claim in French law, that *enrichissement injustifié* is subsidiary to open or legally barred actions, *including contractual ones*, may be added *specific* claims. First, subsidiarity has been invoked explicitly to deny an enrichment action when a contractual action is open.¹⁴ Secondly, it has been invoked when a contractual action is barred:¹⁵

‘But considering that having recalled the subsidiary character of the *action “de in rem verso”*, the court of appeal held that [the claimant] had failed to prove the loan contract on which, principally, his action was

OUP 2006) 40 and note 20; citing *Robert Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm); and Grantham and Rickett (n 3).

¹³ As a reminder, see, eg, Civ, 2 March 1915; [1915] S, Bull somm, I, 20; [1920] DP, I, 102 (first case).

¹⁴ Civ 1re, 15 November 1988, pourvoi n° 87-13356.

¹⁵ Civ 1re, 31 March 2011, pourvoi n° 09-13966, *Bull civ I*, n° 67; [2011] Cont conc consomm n° 6, June, comm 136, commentary by L Leveneur; [2011] LPA 13 July n° 138, 21, noted by Y Dagorne-Labbe: ‘Mais attendu qu’après avoir rappelé le caractère subsidiaire de l’action “de in rem verso”, la cour d’appel a constaté que M Y avait échoué dans l’administration de la preuve du contrat de prêt sur lequel était, à titre principal, fondée son action et en a exactement déduit qu’il ne pouvait invoquer les règles gouvernant l’enrichissement sans cause [...]’

based and properly deduced from this that he could not invoke the rules governing unjustified enrichment [...].’

Addressed in slightly more detail in chapter 3, this latter kind of reasoning is generally seen in unproved contract cases. Exceptions to it were also identified earlier, in cases of particular contracts, such as *ad hoc* partnerships. But even that line of decisions still affirms subsidiarity as the default position.¹⁶

The claim that unjustified enrichment is subsidiary to contract is also present in French scholarship. The *doctrine* which reasons on the broader bases outlined at the start of this subsection tacitly approves it.¹⁷ More targeted claims about enrichment’s subsidiarity to contract also exist. Take, for example, the following under the heading of subsidiarity: ‘if the impoverished person has a *contractual* action against the enriched person, he must sue on this basis to obtain what he is owed’.¹⁸

C. Scotland

Only one Scots case supports unjustified enrichment’s subsidiarity to contract.¹⁹ In *Courtney’s Executors v Campbell*,²⁰ Lord Beckett held that absent ‘special and strong circumstances’, all types of unjustified enrichment claim are ‘available only when no other legal remedy is or has been available’. Whilst the case was about the effect of a

¹⁶ Referring to ‘l’action subsidiaire fondée sur l’enrichissement sans cause’, see Civ 1re, 4 May 2017, pourvoi n° 16-15563, *Bull civ I*, forthcoming; [2017] JCP G 790, noted by Y Dagorne-Labbe; [2017] D 1591, noted by A Gouëzel.

¹⁷ See, eg, A Rouast, ‘L’enrichissement sans cause et la jurisprudence civile’ [1922] RTD Civ 35, 89-91; or the survey and propositions put forward by P Drakidis, ‘La “subsidiarité”, caractère spécifique et international de l’action d’enrichissement sans cause’ [1961] RTD Civ 577, esp 595, 600-601, 613.

¹⁸ F Terré et al and F Chénéde, *Droit civil: Les obligations* (12th edn, Dalloz 2018) no 1311. See also, among others, A Sériaux, *Droit des obligations* (2nd edn, PUF 1998) 333 and note 66; summarising, and citing with approval, Civ 1re, 8 December 1987, pourvoi n° 85-15767, *Bull civ I*, n° 335; [1988] RTD Civ 745, observations by J Mestre.

¹⁹ It has been boldly stated that ‘Lord Hope was clear in *Dollar Land [(Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90] that the law of unjustified enrichment is subsidiary to contract’: R Evans-Jones, ‘Thinking about Principles and Actions: Unjustified Enrichment in Scots and South African Law’ in D Bain and others (eds), *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller* (AUP 2018) 339. The lack of reference to a specific part of Lord Hope’s speech to support this view is unsurprising. His Lordship did not address subsidiarity at all, so Evans-Jones’ claim is not further addressed.

²⁰ *Courtney’s Executors v Campbell* [2016] CSOH 136, 2017 SCLR 387 [52]-[54], [60], [65] esp [60], where Lord Beckett said that ‘as it has been presented to me in this case, the subsidiarity principle applies not just in cases where recompense is the remedy sought but in all cases of unjustified enrichment’.

(by then non-existent) statutory remedy, His Lordship made this observation on two earlier cases:²¹

‘In *NV Devos and Bennet*,^[22] the courts endorsed the pleading of an unjustified enrichment claim as an alternative to a claim based on contract. Again I would not understand this to be an exception to the subsidiarity principle, rather it fits with it. The primary remedy is pursued and unjustified enrichment only comes into play if the primary cause of action fails. In that event, it could not be said that the pursuer failed to employ a primary remedy.’

These remarks were *obiter*.²³ And they relate to cases which do not concern subsidiarity.²⁴ So whether they ‘fit with’ Lord Beckett’s ‘subsidiarity principle’, they do not support it, because they are not about subsidiarity. But it would be unfair to read away his Lordship’s simply expressed belief that, in the cases mentioned, a ‘subsidiarity principle’ applied to regulate the relationship between unjustified enrichment actions and contractual actions. The clear claim is: no action in unjustified enrichment unless a primary action in contract fails.

The language of subsidiarity and its attendant conceptual substance is also put to the relation between unjustified enrichment in a good deal of scholarship.²⁵ Robin Evans-Jones says: ‘[i]n principle enrichment claims are subsidiary to contractual claims. [...] The subsidiarity of unjustified enrichment in this context is achieved by the understanding that a benefit acquired under a valid contract is retained “with cause”’.²⁶ He thinks that a case can be ‘justified on the ground of the subsidiarity of an

²¹ *ibid*, [64].

²² *Devos Gebroeder NV v Sunderland Sportswear Ltd (No 2)* 1990 SC 291 (IH); and *Bennett v Carse* 1990 SLT 454 (OH).

²³ This is confirmed in *Courtney’s Executors* (n 20) [62], [65].

²⁴ It has, nevertheless, been suggested that ‘[s]ubsidiarity emerged’ in one case and featured in the second: HL MacQueen, ‘Unjustified Enrichment, Subsidiarity and Contract’ in V Palmer and E Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (EUP 2009) 341; discussing *Bennett* (n 22); and *Devos Gebroeder* (n 22) 302-303 (the Lord President [Hope]). *Bennett* simply holds that the mere lack of proof of a contract does not bar an enrichment claim. *Devos Gebroeder* was simply about the justification of an enrichment by contract.

²⁵ For the view that this is unnecessary, see M Hogg, *Obligations* (2nd edn, Avizandum 2006) [4.111]-[4.121]. For an account not discussed in detail here, see EM Clive, *Draft Rules on Unjustified Enrichment and Commentary – Appendix to Scottish Law Commission Discussion Paper No 99* (HMSO Scot 1994) rule 11(1)(a)(i), and commentary, 85-91.

²⁶ R Evans-Jones, *Unjustified Enrichment, I: Enrichment by Deliberate Conferral: Condictio* (W Green 2003) [1.99].

enrichment claim to a contractual claim', even though the relevant enrichment had a 'cause'.²⁷ And he argues that a claim can be 'denied on the ground that' one has 'not suffered any loss', where, 'recompense being a subsidiary claim', one has not 'first raised [a] claim on [a] contract' against a third party.²⁸

In later work, Evans-Jones says that unjustified enrichment's relationship to contract is better expressed in terms of exclusion by contract's provision of a 'cause' or 'ground' for an enrichment, 'because an absolute subsidiarity of unjustified enrichment to contract does not exist' and because this 'draws attention to the fact that whether an enrichment claim is excluded or not depends upon the precise terms of the contract'.²⁹ But this is not taken seriously here, because Evans-Jones does not obey his own injunction: this remark appears in a half-chapter packed with the language of subsidiarity. Most relevantly, Evans-Jones *does* use subsidiarity to explain unjustified enrichment's relationship with contract, and 'the purpose of subsidiarity' in this context 'is to ensure that a party to a contract cannot side-step his contractual risks by means of an enrichment claim'.³⁰

Finally noted is Evans-Jones' French-inspired argument that a failed attempt to prove the existence of a contract will take an enrichment claim with it. 'Unjustified enrichment may properly fill a gap in the law but it must not be used to bring about a fraud on the law by subverting its wider aims.'³¹

²⁷ *ibid*, [8.73]-[8.74]; discussing *Express Coach Finishers v Caulfield* 1968 SLT (Sh Ct) 11. In fact, the holding against the pursuer-repairer of the defender's car who had contracted for the repairs with an insurer, which subsequently went insolvent and was certain not to pay, was not denied because of subsidiarity. The court considered that the pursuer was claiming that the defender had benefited from the repairer's work, without demonstrating that this was unjust.

²⁸ Evans-Jones, *Condictio* (n 26) [8.117]; discussing *Renfrewshire Council v McGinlay* 2001 SLT (Sh Ct) 79. In that case, the pursuer had no enrichment claim against the defender who took over a property, over which a third party had a lease with the pursuer, which should, held the court, have been used by the pursuer to claim against the third party. The case is as subsidiarity-free as the other authorities cited by the court for its holding that, since the matter was covered by the terms of a contract, no issue of recompense could arise. See, eg, *Devos Gebroeder* (n 22) 297 (Lord Allanbridge), 303-304 (the Lord President [Hope]), 308 (Lord Coulsfield).

²⁹ R Evans-Jones, *Unjustified Enrichment, II: Enrichment Acquired in Any Other Manner* (W Green 2013) [7.05].

³⁰ *ibid*, [7.12]-[7.14].

³¹ *ibid*, [7.20] and note 36; citing Civ, 12 May 1914; [1914] D Chron 56; [1914] Pandectes, Bull somm, I, 86; [1918] S, I, 41, noted by E Naquet; 'discussed by' B Nicholas, 'Unjustified Enrichment in the Civil Law and Louisiana Law, I' (1961) 36 Tulane L Rev 605, 634f.

Niall Whitty has also written on the subsidiarity of unjustified enrichment to contract. In enrichment by transfer cases, he says that subsidiarity *à la Varney*³² ‘has a large overlap with the requirement of absence of legal justification’, and that if a contract authorises or requires a transfer, then it is justified. ‘So in that very common class of case, a rule of subsidiarity [...] is not needed to reach the correct conclusion’.³³ Whitty criticises the use of ‘the *Varney* notion of the subsidiarity of recompense claims to all other claims as a means of according primacy to contract’.³⁴

But Whitty’s discussion is not all against subsidiarity. In a footnote, he endorses Evans-Jones’ remark ‘that in principle enrichment claims are subsidiary to contractual claims upon the ground that a benefit acquired under a valid contract is retained with cause’.³⁵ This contradicts his previous point about overlap between the concepts of subsidiarity and injustice (something Evans-Jones seems not to notice). He also says that subsidiarity might still be needed in cases such as *Northern Lighthouses Commissioners v Edmonston*,³⁶ where A is in contract with B and performs B’s service itself instead of suing for specific implement.³⁷

The other significant Scots survey of unjustified enrichment’s subsidiarity to contract is Hector MacQueen’s. Therein, the language of subsidiarity is imposed on recompense cases, like *Edmonston*, in which ‘the idea began to emerge’, MacQueen says, but ‘neither the word “subsidiarity”, nor any equivalent or paraphrase,

³² *Varney (Scotland) Ltd v Lanark Burgh Council* 1974 SC 245 (IH).

³³ N Whitty, ‘*Transco Plc v Glasgow City Council*: Developing Enrichment Law after *Shilliday*’ (2006) 10 Edinburgh L Rev 113, 127-128 and note 91; citing, *inter alia*, B Nicholas, ‘Modern Developments in the French Law of Unjustified Enrichment’ in PWL Russell (ed), *Unjustified Enrichment: A Comparative Study of the Law of Restitution* (VUUP 1996) 88; HL MacQueen, ‘Unjustified Enrichment in Mixed Legal Systems’ [2005] RLR 21, 33.

³⁴ Whitty (n 33) 128 and note 92; citing *Devos Gebroeder* (n 22) 300-301 (the Lord President [Hope]). Whitty cites pages 301-302 of the *Session Cases* report; this is corrected here.

³⁵ Whitty (n 33) 128 note 93; discussing Evans-Jones, *Condictio* (n 26) [1.98]-[1.99] (internal quotation marks omitted).

³⁶ (1908) 16 SLT 439 (OH).

³⁷ Whitty (n 33) 121-122, 128, 131. Whitty’s view of *Edmonston* is questionable. It is best explained as a case in which contractual allocation of risk, or gratuitous conferral, justified the defender’s enrichment. The defender was contractually obliged to the pursuers. The pursuers performed the defender’s obligation by building and keeping up a road to the defender’s lighthouse. Lord Johnston noted that the parties were relevantly in contract, and held that the pursuers had acted ‘incautiously’, that before the court was ‘neither an action of implement nor [...] an action of damages. And [the pursuers were] barred by their volunteer action from suing it’: *Edmonston* (n 36) 442-443. The leading short Scots account also takes *Edmonston* as a subsidiarity case: HL MacQueen and Lord Eassie (eds), *Gloag & Henderson: The Law of Scotland* (14th edn, W Green 2017) [24.19] and note 142.

appeared'.³⁸ This broadens subsidiarity's domain when it might simply be declared absent. The latter approach would be consonant with MacQueen's subsequent attempt to exclude subsidiarity from Evans-Jones' French-inspired unproved contract extension.³⁹ But subsidiarity is accorded yet further relevance in circumstances acknowledged as debateable. In discussing *NV Devos Gebroeder v Sutherland Sportswear Ltd*,⁴⁰ MacQueen appears, with respect, not to apply his own view, that the absence of cause and subsidiarity concepts overlap,⁴¹ by saying that '[s]ubsidiarity emerged in the opinion of Lord Hope':⁴² the passage referred to seems rather to concern the justification of enrichment by contract.

Changing tack, MacQueen favours limiting subsidiarity with Whitty.⁴³ He suggests that subsidiarity is not universally applicable in unjustified enrichment. Rather, it is confined to non-monetary enrichment by imposition cases,⁴⁴ and strictly irrelevant to indirect enrichment cases.⁴⁵ MacQueen concludes his paper mindful of the fact that subsidiarity is controversial, and that the Scots approach had until recently been 'unsystematic and un-thought through'. He favours neither its abolition nor its being treated 'expansively'.⁴⁶

³⁸ MacQueen (n 24) 339 and note 74; discussing *Edmonston* (n 36).

³⁹ See MacQueen (n 24) 330 and note 31, 341 and note 79; citing L Smith, 'Property, Subsidiarity and Unjust Enrichment' in D Johnston and R Zimmermann (eds), *Unjustified enrichment: key issues in comparative perspective* (CUP 2002); and *Bennett* (n 22). MacQueen says that 'a strong form of subsidiarity in the law of recompense' à la Lionel Smith was averted in *Bennet*, in which it was argued unsuccessfully that the lack of proof of a contract, which caused a contract claim to fail, took a recompense claim with it.

⁴⁰ *Devos Gebroeder* (n 22).

⁴¹ MacQueen (n 24) 331-332 and note 36; citing with approval A Tate Jr, 'Louisiana Action for Unjustified Enrichment' (1976) 50 Tulane L Rev 883; A Tate Jr, 'Louisiana Action for Unjustified Enrichment: A Study in Judicial Process' (1977) 51 Tulane L Rev 446; Nicholas, 'Civil Law and Louisiana Law, I' (n 31); B Nicholas, 'Unjustified Enrichment in Civil Law and Louisiana Law, II' (1962) 37 Tulane L Rev 49. Specific page references are provided but they are unimportant. It is to be noted that MacQueen's page reference to one of Nicholas' Tulane articles, which he says is in footnote one of his paper, leaves room for doubt as to whether he meant to refer to the originals from the early 1960s or his later piece: B Nicholas, 'The Louisiana Law of Unjustified Enrichment Through the Act of the Person Enriched' (1991) 6/7 Tulane Civ L Forum 3. The page range of this article fits what MacQueen uses but is not in footnote 1 of his paper with the earlier articles, which do not fit the page range.

⁴² MacQueen (n 24) 341 and note 81; discussing *Devos Gebroeder* (n 22) 302-303 (the Lord President [Hope]).

⁴³ MacQueen (n 24) 343-344; citing Whitty (n 33) 130.

⁴⁴ MacQueen (n 24) 344 and notes 89-91; discussing *Transco Plc v Glasgow City Council* [2005] CSOH 76, 2005 SLT 958; Lord Coulsfield and HL MacQueen (eds), *Gloag & Henderson: The Law of Scotland* (12th edn, W Green 2007) [25.19]; and noting the more sceptical view of Hogg (n 25) [4.111]-[4.122].

⁴⁵ MacQueen (n 24) 349-350 and note 117; citing N Whitty, 'Indirect Enrichment in Scots Law, I' [1994] JR 200, 216-217.

⁴⁶ MacQueen (n 24) 351.

II. ANALYSIS OF THE CLAIMS

In this second part of the chapter, the claims set out above are analysed. The framework for discussion is the principles of subsidiarity developed in chapter 2 of this study. The background is the conditional nature of subsidiarity, also developed in chapter 2, and both the law of unjust enrichment, and the general question of its subsidiarity, surveyed in chapters 1 and 3. Since France is the only jurisdiction with law (and *jurisprudence*) on point, its material will be considered first under each subheading, before England's and Scotland's scholarship.

A. Existence

Once in place as an operative rule or principle, subsidiarity is not concerned to determine whether a given entity to which it applies actually exists. To be a rule of subsidiarity, it would seem necessary for a rule to create, maintain, or put an end to, a relationship of subsidiarity between entities. For a rule to destroy one or more of the entities the interaction of which it is supposed to manage might be thought to prevent it from carrying out these functions in relation to that entity. And as argued in chapter 2, subsidiarity is an inherently *conditional* idea. Once an entity does not exist, there is no way for it eventually to become competent. Here, the relevant entities are, on one side, the law of contract and contract claims, and on the other, the law of unjust enrichment and unjust enrichment claims. All but one of the above accounts fail to satisfy the instant principle of subsidiarity. The one does not fail because it is silent on the point.

The general claim found in French law (now the *Code civil*, art 1303-3) and scholarship that *enrichissement injustifié* is subsidiary to open or legally barred contractual actions fails. Focusing particularly on the *Code civil*, the rule clearly makes the enrichment action disappear (the claimant 'has no action').⁴⁷ So it is not a rule of subsidiarity. The same applies to the more specific reasoning in particular cases, and other academic accounts.

⁴⁷ The partial exception to the obstacle of law bar, for *negotiorum gestio* in the *Code civil*, art 1303-5, makes no difference to the basic principle here. This issue is discussed further in chapter 9.

According to Grantham and Rickett's account, there is a rule that unjust enrichment has no role where the restoration of the *status quo* prior to a defect in subjective consent is already provided for, and it is a rule of subsidiarity. A specific application of this rule of subsidiarity is that unjust enrichment has no role to play where a contract provides for the relevant restoration. At neither level of generality can subsidiarity be at play here. The rule determines the existence of any unjust enrichment claims when a contract relevantly exists.

The first limb of Burrows' account cannot be about subsidiarity. His rule determines whether an enrichment is unjust, and so whether unjust enrichment exists, on any set of facts. To deny that the same is true of the second limb would be inconsistent, both with Burrows' recognition of the possibility that unjust enrichment's existence is determined thereunder,⁴⁸ and the reasoning behind the first limb. As to the third limb, it may be argued that a contract of compromise justifies any potential enrichment in respect of which its aim is to settle any dispute.⁴⁹ Even if that is not precisely correct, there will still never be an unjust enrichment claim if any such potential claim has already been compromised, and it will not exist to figure among any other claims entities – or entities – which may interact on a relevant set of facts. The third limb thus also infringes the instant principle of subsidiarity.

For Virgo, where there is a valid contract, unjust enrichment has no 'role to play in any dispute between the parties'. To that extent, Virgo's rule determines the existence of unjust enrichment. Rules of subsidiarity do not do that.

⁴⁸ Of forfeiture, 'non-refundable' and 'entire obligation' clauses, Burrows says that '[o]n an alternative analysis, [...] where those clauses apply, one does not even reach the stage of there being a cause of action in unjust enrichment which is then overridden (ie as a matter of construction, there is no failure of consideration)': Burrows, *Restatement of Unjust Enrichment* (n 7) 90-91.

⁴⁹ See *Brent v Slegg Construction Materials Ltd* [2007] BCSC 661 [44] (Joyce J); *Apotex Inc v Abbott Laboratories Limited* [2013] ONSC 356 [194] (Quigley J); affirmed on other grounds [2013] ONCA 555; *Lineker v Capri Insurance Services General Partnership* [2013] BCSC 267 [32] (Weatherill J); *Montor Business Corporation v Goldfinger* [2016] ONCA 406 [116] (Pepall JA, with whom Cronk, and Lauwers JJA agreed); leave to appeal refused [2016] CanLII 89828 (SCC); *Shannex Inc v Dora Construction Ltd* [2016] NSCA 89 [58] (Fichaud JA, with whom Farrar and Bourgeois JJA agreed), and the authorities there cited.

Lord Beckett's view in *Courtney's case* is open to the same objection. His Lordship says that 'the subsidiarity principle' means that 'unjustified enrichment only comes into play if the primary cause of action fails'. This removes any need for subsidiarity in its basic function.

Evans-Jones' account is also open to the same objection. Take his first view about unproved contracts' ability to take enrichment claims with them: contract is obviously determining whether unjustified enrichment can be at play. His second view, that an enrichment claim, which is subsidiary, may be denied because a relevant contract justifies the impugned enrichment, is similarly problematic (the 'subsidiarity of unjustified enrichment in this context is achieved by the understanding that a benefit acquired under a valid contract is retained "with cause"'). This view entails that there would *be* no unjustified enrichment, because contracts provide legal grounds for enrichments. You cannot make subsidiarity determine the existence of unjustified enrichment – or anything else – on a given set of facts.

Whitty's self-contradictory approval of Evans-Jones' second view cannot be supported. Nor can his acceptance of subsidiarity's continued relevance in cases like *Edmonston*. We may retrospectively understand this decision as one in which contractual allocation of risk, or gratuitous conferral, justified the relevant enrichment. Lord Johnston held that the pursuers had taken 'volunteer action', and noted that the parties were relevantly in contract.⁵⁰ To insist upon subsidiarity's pertinence, Whitty must accept that his rule is the same one that says: 'the pursuer's enrichment is justified, so there *is* no unjustified enrichment in the first place'. Determinative as it is of unjustified enrichment's existence, this cannot be a rule of subsidiarity.

⁵⁰ *Edmonston* (n 36) 442-443 (Lord Johnston). This case deals with a situation in which the pursuer and defender to the enrichment claim were in contract with *each other*. As noted in part III(A), below, where an enrichment pursuer or an enrichment defender has a contract with a third party to the enrichment claim, that contract may also justify the third party's enrichment. The issue of subsidiarity would not then surface, as explained in part III(B), below. More difficult are cases in which a third party to a contract performs a contractual obligation of a party to that contract, thereby enriching (i) the party whose obligation is performed, (ii) another party to the contract, or (iii) a fourth, non-contractual-party. In case (ii) the contract could easily justify the relevant enrichment, by evincing an intention that a non-party should not benefit from performing according to its provisions, with a non-assignment clause, for example. In cases (i) and (iii), though justification by contract is possible, it is less likely; and if the contractual allocation of risk is not upset, unjustified enrichment should be allowed to operate. In no case could the issue of subsidiarity arise: either contract reigns, and there is no unjustified enrichment to be subsidiary to anything; or it does not, and there is no overlap between contract and enrichment for subsidiarity to mediate.

MacQueen does not make any concrete claims under this head.

B. Plurality

A relationship of subsidiarity positively requires the existence of at least two entities, or groups of entities. Without a plurality of entities, no relationship would be possible at all in a given context, and whatever authority existed in that context would lie unconditionally with the only relevantly extant entity. None of the above accounts satisfies this principle.

In French law, and for the commentators there who favour subsidiarity in the context under discussion, the existence of an open contractual action means that there can be no *action en enrichissement injustifié*. The same is true when the former action is legally barred. In neither situation will more than one action relevantly exist. One thing cannot be in a relationship with another thing, if one of those things does not exist. An enrichment claim cannot be subsidiary to a contractual one if it does not exist.

On Grantham and Rickett's account, if a contract relevantly covers the transfer of a benefit, then 'it is no longer the case' that the enrichment is unjust. So when contract exists, unjust enrichment does not. They are not talking about the latter's subsidiarity to contract here. There can be no relationship of subsidiarity between enrichment and contract on the envisaged facts, because there is no relevant plurality of entities to *have* a relationship. Grantham and Rickett define subsidiarity as a 'relationship between *two* claims or doctrines' (emphasis added). So their enrichment-contract example does not conform to their own description of subsidiarity. It will be recalled from chapter 5 that their enrichment-property illustration is bad, too. Their account thus offers no example compliant with their own definition of subsidiarity. It cannot be supported.

All three limbs of Burrows' account involve the non-existence of unjust enrichment when the rules are applied to facts. This means that in no way could subsidiarity form part of a plurality of entities with contract, and so be in a relationship of subsidiarity. The same objection applies to Virgo's views. For him, where there is a valid contract,

unjust enrichment has no 'role to play in any dispute between the parties'. To that extent, the subsidiarity of unjust enrichment to contract is logically impossible.

The same logical impossibility affects Lord Beckett's view of Scots law in *Courtney's* case, according to which unjustified enrichment and contract cannot co-exist.

Evans-Jones thinks that an enrichment's justification by contract means that there is a relationship of subsidiarity between the laws of unjustified enrichment and contract. This is wrong, because where contract provides the necessary justification, whether by consecrating or excluding redress, for example, unjustified enrichment does not and cannot arise. The same is true of Evans-Jones' opinion about unproved contracts when it is exposed to hypothetical facts.

Whitty's self-contradictory approval of Evans-Jones' 'justification of enrichment by contract = subsidiarity' view cannot be supported for the further reason just given. It was argued in the preceding subsection that cases like *Edmonston* are really just examples of this justification view. So there will never on such facts *be* any unjustified enrichment to be subsidiary to any contract. Without such a plurality of entities, there can be no relationship of subsidiarity. Whitty does say that often, 'a rule of subsidiarity [...] is not needed to reach the correct conclusion'. But he does not draw the logical consequence from the justification of enrichment by contract point: the impossibility of unjustified enrichment's existence.

MacQueen's account seems incorrect to the extent that it accords relevance to subsidiarity when, in fact, a contract would prevent the existence of a supposedly subsidiary unjustified enrichment, such that it could not participate in a relationship of subsidiarity. It must, in fairness, be said that MacQueen is clearly open to this criticism. Take, first, his observations on the *Devos Gebroeder* case. Take, secondly, his views that that 'enrichment arising from a valid contract is justified and not reversible'; but that Scots law recognises 'a principle of subsidiarity which is sometimes interpreted as meaning that enrichment recovery is excluded whenever there is a contract'.⁵¹

⁵¹ MacQueen (n 24) 350.

C. Overlap

For a rule of subsidiarity to be relevant in any context, at least two entities in that context must be capable of overlapping if unrestrained. Otherwise, there would be nothing for a conditional rule of subsidiarity to do. None of the above accounts satisfies this principle.

As in previous chapters, this is a short point. In reality, and whether they themselves openly address this, none of the above accounts relevantly admits that enrichment and contract can co-exist. So none of them admits that they might overlap – that is, concur. If none admits that, then none leaves any role for subsidiarity. Accounts which leave no role for subsidiarity cannot sensibly be said to be about subsidiarity.

D. Meta-authority

For a rule of subsidiarity definitively to resolve questions of allocation and overlap, it must bind the relevant entities by constituting an independent, higher authority in relation to them. If this were not so, and the relevant entities could manage their relations without an independent, higher, organising rule (as, for example, would be the case if one of them were sovereign and could dictate any relevant interactions), there would be no need for subsidiarity. This is subsidiarity as meta-authority. A rule of subsidiarity is what dictates whether the entities to which it applies have competence or authority, however they might behave if unrestrained. And the condition, howsoever framed, on which allocation takes place, goes to the general essence of subsidiarity. Of the accounts which can be understood under this head, none satisfies the instant principle.

The rule in article 1303-3 of the *Code civil* is not a meta-authority in relation to the *action en enrichissement injustifié* or contract actions. It is placed in the chapter of the *Code* on the enrichment action, of which it is an ‘inherent condition’.⁵² This is clearly

⁵² See Civ 1re, 4 April 2006, pourvoi n° 03-13986, *Bull civ I*, n° 194; [2006] RLDC, n° 28, 11, observations by S Doireau: ‘le caractère subsidiaire reconnu à l’action fondée sur le principe de l’enrichissement sans cause ne constitue pas une fin de non recevoir au sens de l’article 122 du nouveau Code de procédure civile mais une condition inhérente à l’action’; CA Rennes, 18 December 2007, RG n° 06/00867; CA Nîmes, 8 January 2008, RG n° 04/01413; CA Basse-Terre, 5 January 2009, RG n°

reflected in the more specific reasoning addressed above, also. So the rule is not sourced independently of the *action de in rem verso*, one of the entities to which it is supposed to apply. And it does not actually govern any potential contract action which might come under its formula, either. It works by making the *action en enrichissement injustifié* disappear in the face of a contract action, whether open or legally barred. The contract claim decides for itself, so to speak, what it is, or is not, going to do, and there is nothing in article 1303-3 that can change that. The French commentary referred to above appears to accept that subsidiarity is part of the *action de in rem verso*. This suffices to declare all of it incorrect on the meta-authority point. Rules which are not independent, and cannot actually govern the things to which they apply, are not rules of subsidiarity.

Grantham and Rickett say that ‘subsidiarity is not merely a consequence of unjust enrichment’s inherent doctrinal nature, but also reflects the ordering of private law in the common law system’.⁵³ What they see as the subsidiarity of unjust enrichment to contract is part of unjust enrichment. So it is not independent or sourced on a higher plane than at least one of the entities to which it is supposed to apply. It is not subsidiarity at all.

All three limbs of Burrows’ account are rules of unjust enrichment: the first tells us about injustice; the other two are worded as rules about defences, and as argued under subsection A, they are probably really about injustice, too. Whoever is right on this point, Burrows’ rules are not independent of unjust enrichment, do not constitute meta-authority in relation to unjust enrichment, and so cannot be rules of subsidiarity. This is also correct when one turns to consider the rules’ relationship with contract, and contract claims. Contract sweeps unjust enrichment from play on Burrows’ account. Without authority over any relevant contract claim, they are reactive, not directive. They are not about subsidiarity.

Virgo’s account is open to the same objections that Burrows’ is under this head. They are not repeated.

05/01889; CA Douai, 26 October 2009, RG n° 08/06633; CA Limoges, 4 March 2013, RG n° 12/00560; CA Metz, 21 September 2017, RG n° 17/00339.

⁵³ Grantham and Rickett (n 3) 293.

Lord Beckett's account in *Courtney's case* is ambiguous as to the source of his Lordship's 'subsidiarity principle'. The strongest suggestion that it is supposedly part of unjustified enrichment appears in recognition of common ground between the parties that recompense, sought in *Varney*,⁵⁴ and *Transco*,⁵⁵ is merely a remedy for unjustified enrichment, but that subsidiarity is not confined to recompense cases.⁵⁶ But this remains weak evidence, and it would be unfair to conclude either way upon the point which interests us here.

For Evans-Jones, an important part of unjustified enrichment's subsidiarity concerns contract's justification of a given enrichment. It seems that, for him, the rule is part of unjustified enrichment. Like similar rules in accounts surveyed above, it is not about subsidiarity. His further point, that failure to prove the existence of a contract will take an enrichment claim with it, is made citing French *jurisprudence*, which is part of that relating to the *action de in rem verso*. So it is open to the same objection: it is not meta-authority.

Whitty criticises the idea that any 'primacy' – for which, read sovereignty – should be accorded to contract using subsidiarity. If subsidiarity *were* doing that, it might be possible to say that, for Whitty, subsidiarity *does* constitute a meta-authority over contract and unjustified enrichment. But he says the opposite, and tells us clearly that his account cannot be correct on the meta-authority point. His account is further unsafe to the extent that it relies on Evans-Jones' 'justification of enrichment by contract = subsidiarity' view.

MacQueen's view that subsidiarity and absence of cause overlap seems to permit the conjecture that, for him, subsidiarity is part of unjustified enrichment and so not a meta-authority.

⁵⁴ *Varney* (n 32).

⁵⁵ *Transco* (n 44).

⁵⁶ *Courtney's Executors* (n 20) [52].

E. Not sovereignty

For a relationship of subsidiarity to exist, no entity said to be part of that relationship can be sovereign over any other entity in that relationship. In such a situation, there would be nothing for subsidiarity to do, because authority in that context would be allocated *unconditionally*. This goes against the essence of subsidiarity – as argued in chapter 2, subsidiarity is a *conditional* idea.

This is another short point. On all but one of the above accounts,⁵⁷ it is clear that, whenever contract exists, it always wins against unjust enrichment, so to speak. There is no condition. There is no doubt. In French law, article 1303-3 of the *Code civil* and the specific *jurisprudence* confirm that there is no *enrichissement injustifié* on the field on which contract is at play, or was, until itself barred by an obstacle of law. The commentators cited above accept this, too. Grantham and Rickett's definition of subsidiarity specifically says that 'unjust enrichment [...] is subsidiary in the sense that the scope and operation of the principle of unjust enrichment are necessarily constrained by the scope and operation of the other core doctrines of the private law'. One of these doctrines is 'consent-based obligations (dominantly but not solely the law of contract)'.⁵⁸ All three limbs of Burrows' account speak to contract's ability to overpower unjust enrichment. For Virgo, 'it is vital' that unjust enrichment give way to contract. Evans-Jones thinks that for unjustified enrichment to do anything which contract would not would be a 'fraud on the law'. Whitty denies a straightforward 'primacy' of contract, but it is actually entailed by his endorsement of Evans-Jones' general principle (according to which 'justification of enrichment by contract = subsidiarity'). MacQueen's acceptance that Scots law recognises a principle of subsidiarity which is sometimes interpreted as meaning that enrichment recovery is excluded whenever there is a contract⁵⁹ seems also to expose him to this sovereignty objection.

⁵⁷ Lord Beckett's account in *Courtney's* case, *ibid*, is again ambiguous, so is not criticised under this head.

⁵⁸ Grantham and Rickett (n 3) 273.

⁵⁹ MacQueen (n 24) 350.

F. Not concurrence

An extant relationship of subsidiarity is incompatible with the free concurrence of the entities said to be part of that relationship. Conditionality would be absent in such a situation, since competence would not be ordered in any way at all. The whole point of subsidiarity is to prevent concurrence which is happening, or might happen, as argued in chapter 2.

All of the accounts discussed here infringe at least one of the principles of subsidiarity discussed under subheadings B, C, and D of this part of the chapter. So to some extent, none admits that unjust enrichment and contract can co-exist, or concur when not restrained by a meta-authority. None, therefore, breaches the instant principle of subsidiarity. This is only a small consolation, of course, since if there is no concurrence to prevent, subsidiarity is redundant, assuming that it is correct to say that subsidiarity exists in the first place, which, on the accounts here surveyed, it does not.

III. RE-ANALYSIS OF THE CLAIMS

This part of the chapter elaborates on a better explanation than subsidiarity for unjustified enrichment's contingency on the operation of contracts that exclude or limit unjust enrichment claims. It is that contracts which do this *justify enrichments*, to which extent, there is no unjust enrichment to be subsidiary to anything. First, that contracts justify enrichments will be demonstrated comparatively. Secondly, the effect of this upon the accounts surveyed above will be set out.

A. Contracts as justifications for enrichments

As Edelman J put it in an Australian case: '*no cause of action* for restitution of unjust enrichment *can exist* where the action is *inconsistent* with the express or implied terms of a contract'.⁶⁰ The *Cour de cassation* has held: 'an enrichment which has its origin

⁶⁰ *Anderson v McPherson (No 2)* [2012] WASC 19 [239] (emphasis added); approved in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 10)* [2016] WASC 90 [46] (Chaney J). See also *Re Beppler & Jacobson Ltd* [2018] EWCA Civ 763 [63] (Gloster LJ, with whom Singh LJ and Sir Jack Beatson agreed); *Landmark Ltd v American International Bank (In Receivership)* [2014] UKPC 17 (Antig & Barb) [29] (Lord Hodge, with whom Lord Neuberger, Lord Clarke, Lord Sumption, and Lord Toulson agreed). For the concern,

in one of the lawful modes of acquiring rights, such as a contract, is not unjustified'.⁶¹ This principle applies most clearly to benefits transferred under valid and subsisting contracts.⁶²

*Example.*⁶³ A Ltd contracts with B Ltd to advance funds to X, B's liquidator, in order to fund B's administration by X. On its true construction, the contract contains a right for A eventually to be repaid by B. So A has no unjust enrichment claim against B.

As the precise wording of Edelman J's dictum indicates, unjust enrichment is impossible on the above facts, where a contract between the claimant and defendant justifies the latter's enrichment.⁶⁴ But the principle does not stop there. 'Generally, a third party is not liable in unjust enrichment simply for benefitting from a contract between two other parties.'⁶⁵

*Example.*⁶⁶ Builder Ltd contracts with Tax Vehicle Ltd to do construction work for Ms Clever. Builder is left unpaid. Builder cannot claim against Ms Clever because the condition on which it carried out the work benefitting Ms Clever was that it would be paid by Tax Vehicle. So Ms Clever is not unjustly enriched.

in France, that the contract must cover the relevant enrichment, see Civ 1re, 20 December 1993, pourvoi n° 92-10134, *Bull civ I*, n° 383; [1994] JCP G, II, 22307, noted by F Roussel; [1994] RTD Civ 914, observations by J Patarin; Com, 4 November 1982, pourvoi n° 81-14631, *Bull civ IV*, n° 331.

⁶¹ Civ 3e, 25 February 1975, pourvoi n° 73-13781, *Bull civ III*, n° 77; Soc, 17 June 1960, *Bull civ IV*, n° 648. See also *Code civil*, art 1303-1.

⁶² *Bailey v Barclays Bank Plc* [2014] EWHC 2882 (QB) [67](4) (HH Judge Keyser); point not appealed [2015] EWCA Civ 667; *Toll Global Forwarding Pty Ltd v Theiss Pty Ltd* [2015] WASC 365 [232], [245] (Kenneth Martin J); *Robertson Construction Central Ltd v Glasgow Metro LLP* [2009] CSOH 71, 2009 GWD 19-304 [17]-[21] (Lord Hodge); *Jones v Muir* unreported 10 March 2015 (Sh Ct, Lochmaddy), 2015 GWD 11-183 [6] (Sheriff Principal Derek Pyle). Until set aside, the same goes for voidable contractual obligations, as to which, see A Burrows, *A Restatement of the English Law of Contract* (OUP 2016) §34(3).

⁶³ This example is based on *TOC Investments Corporation v Beppler & Jacobson Ltd* [2016] EWHC 20 (Ch) [89], [96], [102], [110], [117]-[126] (Hildyard J); reversed [2018] EWCA Civ 763 esp [63] (Gloster LJ, with whom Singh LJ and Sir Jack Beatson agreed).

⁶⁴ See also two *arrêts* of the *Cour de cassation* in quick succession with the same *attendu de principe*: Civ, 21 February 1944; [1944] Gaz Pal, I, 249; Civ, 17 May 1944; [1944] S, I, 132, noted by L Audiat.

⁶⁵ *Thimjohn Farms Partnership v First National Bank and Trust* (2013) 837 NW 2d 327 (NDSC) 336 (Grothers J, with whom Maring and Sandstrom JJ agreed). For a Scots case denying an enrichment claim where the pursuer had a contract with a third party, see *Express Coach Finishers* (n 27) 12 (Sheriff-Substitute Irvine Smith). See also *Dantzer v CP Loewen Enterprises Ltd* [2005] ABCA 159, (2005) 54 Alta LR (4th) 182 [3] (Paperny JA, for Côté JA and Whittmann ACJ), affirming [2004] ABQB 6 esp [45] (Gallant J).

⁶⁶ This example is based on *MacDonald Dickens & Macklin (a firm) v Costello* [2011] EWCA Civ 930, [2012] QB 244 [20]-[23], [30] (Eherton LJ, for Patten and Pill LJ).

The same position may also hold where it is the enrichment *defendant* who has a contract with a third party that covers the enrichment in question.⁶⁷ A contract need not even subsist for it to prevent an unjust enrichment's coming into existence: a fully performed contract can serve as a relevant justification for benefits transferred during its currency.⁶⁸

*Example.*⁶⁹ Investor Ltd participates in Fund Ltd's investment scheme. Their agreement contains definitive valuation, withdrawal and redemption provisions. Investor makes returns and cashes out. Unfortunately, Fund puts most of its capital with the fraudulent scheme concocted by Evil Ponzistas Ltd. Fund collapses. Fund has no claim in unjust enrichment against Investor for the returns to which it was entitled under its contract with Fund, even though there no longer exists an agreement between the parties.

A contract's justificatory power can survive termination as well as performance. An enrichment transferred pursuant to a right accruing before the termination of a contract is justified. The same principle applies: 'enrichment sanctioned by the contract is not unjust'.⁷⁰ And in continuation of the argument outlined in chapter 2, and set out in more depth in chapter 4, it should further be noted for completeness that a contract need not confer a right to a benefit in order for it to justify the transfer of that benefit. What matters is whether the contract, by its terms or distribution of risks, makes that benefit

⁶⁷ *Lumbers v W Cook Builders Pty Ltd (in liq)* [2008] HCA 27, (2008) 232 CLR 635 [43]-[55] (Gleeson CJ), [79]-[80], [125]-[126] (Gummow, Hayne, Crennan and Kiefel JJ); Civ 3e, 28 May 1986, *pourvoi* n° 85-10367, *Bull civ* III, n° 83; [1987] RTD Civ 548, observations by J Mestre.

⁶⁸ *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2015] WASC 429 [101] (Chaney J); *Palmar Properties Inc v JEL Investments Ltd* [2013] BCSC 623 [23]-[24], [33], [71] (Brown J), affirmed [2014] BCCA 169; Com, 18 January 1994, *pourvoi* n° 91-22237, *Bull civ* IV, n° 27; *Gibson v Gibson* unreported 4 August 2010 (Sh Ct, Peterhead), 2010 GWD 30-614 [16] (Sheriff Principal Sir Stephen Young QC).

⁶⁹ This example is based on *Fairfield Sentry Ltd v Migani* [2014] UKPC 9 (BVI), [2014] 1 CLC 611 [3], [17], [18]-[19], [24], [27]-[31] (Lord Sumption, with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Toulson agreed).

⁷⁰ See *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm) [85], [87], [89]-[93] (Leggatt J); Com, 23 October 2012 (two *arrêts*), *pourvois* n°s 11-21978, 11-25175, *Bull civ* IV, n°s 192-193; [2012] D 2862, observations by N Dissaux; [2013] RTD Civ 114, observations by B Fages; [2013] RDC 641, observations by C Grimaldi; *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90, 94, 100-101 (Lord Hope, with whom Lord Browne-Wilkinson, Lord Jauncey, Lord Nolan, and Lord Hoffmann agreed). On the survival, in English law, *post-termination*, of rights accrued *pre-termination*, see *Hurst v Bryk* [2002] 1 AC 185 (HL) 193-194 (Lord Millett, with whom Lord Browne-Wilkinson, Lord Nicholls, Lord Hope and Lord Clyde agreed). A contract may also provide for a party's rights to survive termination so that payments *not yet made* must still be made and are justified by the agreement: *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* [2013] EWHC 214 (Comm), [2013] 2 Lloyd's Rep 26 [18]-[21], [27], [41]-[42] (Eder J).

a just one. This appears, for example, from common law cases, in which contracts conferred no rights to payment at all, but impliedly excluded unjust enrichment claims;⁷¹ or French cases declaring that enrichments resulting from the performance or cessation of performance of contracts according to their terms, but in respect of which no provision is made in the contract, are justified.⁷²

B. The impact of the re-analysis

It has been said that '[t]here can be no better justification for an enrichment' than contract.⁷³ The upshot is that, where a contract relevantly approves the receipt of a benefit, the issue of unjust enrichment 'does not arise'.⁷⁴ Put the other way round, unjust enrichment is 'exclusive of the idea of contract, and always presupposes an obligation foreign to any positive agreement'.⁷⁵

Unjust enrichment cannot, therefore, ever be subsidiary to contract. The two institutions cannot co-exist in the required manner. But the law and scholarship addressed in this chapter need only jettison subsidiarity in favour of the justification-based view for the positions they endorse to remain standing.

CONCLUSION

This chapter first surveyed English, French and Scots law for claims that unjust enrichment is subsidiary to contract. It highlights France as the only jurisdiction considered to make such claims very strongly, and subsidiarity's slight but notable

⁷¹ *Beppler & Jacobson* (n 60) [63] (Gloster LJ, with whom Singh LJ and Sir Jack Beatson agreed): '[t]he short point here is that a claim to unjust enrichment in the present case (even on the assumption that it might otherwise lie) would directly interfere with the manner in which the parties had allocated risk under the terms of the contract. In my judgment, therefore, the judge's conclusion on subrogation cannot stand if, as I have held, he is wrong on his primary conclusion that TOC has a pre-existing right of repayment'; *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7 (Gue) [144]-[151] (Lord Hodge, with whom Lord Sumption and Lord Carnwath agreed), [194] (Lord Mance, dissenting on other grounds), [237] (Lord Briggs, dissenting on other grounds).

⁷² Com, 23 October 2012 (two *arrêts*) (n 70).

⁷³ *Dollar Land* (n 70) 94 (Lord Hope, with whom Lord Browne-Wilkinson, Lord Jauncey, Lord Nolan, and Lord Hoffmann agreed).

⁷⁴ *Landmark* (n 60) [29] (Lord Hodge, with whom Lord Neuberger, Lord Clarke, Lord Sumption, and Lord Toulson agreed).

⁷⁵ Cour de Grenoble, 15 December 1909; [1910] J de la C de Grenoble 8; [1918] S, I, 41. See, more recently, CA Paris, 12 June 2014, RG n° 12/08266.

foothold, in one Scots enrichment case. English and Scots scholars appear to have produced more relevant accounts than they have on the subsidiarity of unjust enrichment to property.

The second part of this chapter suggested that it is incorrect to claim that unjust enrichment is subsidiary to contract. First, with the exception of MacQueen's account, which is hard to interpret on this point, what the law and scholarship surveyed above take to be rules of subsidiarity obviously determine the existence of unjust enrichment, one of the entities which is supposed to be in a relationship of subsidiarity. Rules of subsidiarity do not do that. Secondly, they do not admit that unjust enrichment and contract can exist at the same time, such that there is never a relevant plurality of entities, required for a relationship of subsidiarity. Thirdly, they do not admit that unjust enrichment and contract can overlap, without the possibility of which subsidiarity is redundant. Fourthly, with the exception of Lord Beckett's account in *Courtney's case*, which is hard to interpret on this point, they do not see their rules of subsidiarity as meta-authorities, which they must be if they are to be rules of subsidiarity. Fifthly, and leaving aside *Courtney's case* again, they all see contract as somehow sovereign over unjust enrichment – something antithetical to subsidiarity. It is conceded that no account breaches this study's sixth principle of subsidiarity. But that is only because none successfully surmounts hurdles logically prior to its relevance.

The third part of this chapter suggested a better explanation of unjust enrichment's relations with contract based on the view that contracts provide justifications for enrichments. This view can deliver unjust enrichment discourse from talk of subsidiarity to contract.

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CHAPTER 7

UNJUST ENRICHMENT, SUBSIDIARITY, AND TORT OR DELICT

Previous chapters in this study provide background on the law of unjust enrichment, introduce a definition and principles of subsidiarity, and sketch the history of, and reasons for, subsidiarity in the law and scholarship on unjust enrichment. This chapter is the fourth to put those general chapters to use. Its first part addresses arguments in the law and literature made about unjust enrichment's subsidiarity to the law of tort or delict, or tortious or delictual actions. France is the only jurisdiction with positive claims on point. After these are set out, they are tested against the theory of subsidiarity developed in chapter 2 of this study. It will be seen that the available material cannot correctly be characterised as entailing unjust enrichment's subsidiarity to tort or delict. The third part of this chapter explains why, in France, subsidiarity is irrelevant to how *enrichissement injustifié* interacts with delict.

I. THE CLAIMS

This part of the chapter presents claims about unjust enrichment's subsidiarity to tort or delict. They are found only in French law and scholarship.

A. England

In England, and other common law jurisdictions, it is not the law that unjust enrichment is *subsidiary* to the law of tort, or tort claims. And it is unlikely to become the law. This is arguable, based on the interaction of contract and tort actions. The language of subsidiarity has not been put to this in leading cases, and the substance of the law does not fit the principles of subsidiarity put forward in this study. *Prima facie*, there is a free choice between open actions in contract and tort arising distinctly from the same *ensemble* of facts.¹ The mere availability of a tort action will not prevent the exercise

¹ *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 (HL) 191-194 (Lord Goff, with whom Lord Keith of Kinkel, Lord Browne-Wilkinson, Lord Mustill, and Lord Nolan agreed); *Astley v Austrust Ltd* (1999) 197 CLR 1 (HCA) [44]-[48], [84]-[88] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [129], [135], [142] (Callinan J, dissenting on other grounds); both cases approving aspects of Le Dain J's judgment in *Central Trust Co v Rafuse* [1986] 2 SCR 147 (SCC) esp 204-206 (Dickson CJ, and Beetz, Estey, McIntyre, Lamer, and Wilson JJ concurring).

of a contractual one.² The mere unavailability of a contractual action does not take a tort action with it. For that, the contract's terms must exclude the tortious duty.³ That contract can do this without reference to any higher rule governing the interaction of both areas of law makes the questions which arise here inapt for resolution by subsidiarity – meta-authority is absent.⁴

It has not been possible to trace any academic claims that unjust enrichment is *subsidiary* to the English or common law of torts. Contrary views have been expressed, though: Andrew Burrows favours concurrent liability in unjust enrichment and tort, but without reference to subsidiarity.⁵ And Ross Grantham and Charles Rickett explicitly argue that most torts do not 'interface' with unjust enrichment, and that those which might do 'not contradict' its 'subsidiary nature'.⁶

B. France

As shown in chapter 3, article 1303-3 of the *Code civil*, and the *Cour de cassation*'s formulae from which it derives, are claims or rules about the subsidiarity of the *action de in rem verso* in France. Though they do not themselves use the language of subsidiarity, many *other* sources, referred to earlier, do put it to the now-codified rules. Article 1303-3 encompasses open or legally barred delictual actions, and the older holdings mention delict specifically.⁷

² See the speeches of Lord Nicholls (with whom Lord Goff, and Lord Mackay agreed) and Lord Steyn (with whom Lord Goff, Lord Mackay, and Lord Mustill agreed), in *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 (HL) 40-41, 52-53.

³ For a case in which this happened, and usefully states the English law, see *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2012] QB 44 [77]-[80], [87]-[88] esp [84], [88] (Jackson LJ, with whom Maurice Kay LJ agreed), [91], [94] (Stanley Burnton LJ). It should be noted that, whilst a contractual exclusion may prevent a tortious duty from arising in the first place, this is perhaps not the orthodox view of the effect of exclusion and limitation clauses on *contractual* duties: Unfair Contract Terms Act 1977, ss 3(2)(b), 13; *Phillips Products Ltd v Hyland* [1987] 1 WLR 659 (CA) 664 (Slade LJ, with whom Neill J and Sir John Megaw agreed).

⁴ This paragraph could also to apply to tort's interaction with statute. Take the implied statutory permission precluding tortious liability in trespass in *The Manchester Ship Canal Company Ltd v United Utilities Water Plc* [2014] UKSC 40, [2014] 1 WLR 2576 [19] (Lord Sumption, with whom Lord Clarke and Lord Hughes agreed), [35]-[36] (Lord Toulson) [70]-[75] (Lord Neuberger).

⁵ 'A right to restitution for unjust enrichment may be claimed concurrently with another claim (for example, for a tort or breach of contract) but satisfaction of more than one claim is not permitted where it would produce double recovery': A Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) §1(4) and commentary, 28-29; citing *Henderson* (n 1).

⁶ R Grantham and C Rickett, 'On the Subsidiarity of Unjust Enrichment' (2001) 117 LQR 273, 295-296.

⁷ See, eg, Civ, 2 March 1915; [1915] S, Bull somm, I, 20; [1920] DP, I, 102 (first case).

To this general claim in French law, that *enrichissement injustifié* is subsidiary to open or legally barred actions, *including delictual ones*, may be added *specific* claims. Take open delictual actions first. In one decision, the *Cour de cassation* approved a court of appeal for having based its decision on delict and not unjustified enrichment. It seems clear from the reasoning that, had this not happened, the judgment would have been quashed. And the vocabulary of subsidiarity used before the court was implicitly approved.⁸ The *Cour de cassation* seems never to have endorsed an option between an open action in delict and the *action de in rem verso*.⁹ Predictably, though, the lower courts are against it.¹⁰ So, a recent case held that that the mere ‘theoretical applicability’ of the general law of delict sufficed to exclude unjustified enrichment based on its ‘subsidiary character’.¹¹

The same disfavour is shown towards unjustified enrichment in the presence of legally *barred* delictual actions. In a case in which the claimant failed to prove the existence of fault by the defendant (a necessary element of success in the France’s general delict action), and whose enrichment action was therefore rejected, the *Cour de cassation* dismissed her appeal by holding that ‘the court of appeal which, giving specific and solemn reasons, applied the principles relating to unjustified enrichment and highlighted its subsidiary character, rendering the claim [...] inadmissible, has

⁸ Civ 1re, 9 May 1996, pourvoi n° 94-16114. Without the vocabulary, see TGI Paris, 24 November 1977, [1978] D IR 341, observations by M Cabrillac; Civ 2e, 10 October 2002, pourvoi n° 00-18554.

⁹ *Contra* is N Almosnino, *Le caractère subsidiaire de l'action de in rem verso* (LGDJ 1931) 115-121; citing Req, 21 December 1926; [1927] Gaz Pal, I, 426; [1929] Rép jur transp, II, 504, which is analysed as having permitted enrichment liability in the presence of a potentially open (but unpleaded) delictual action. Following the first world war, a special statute prohibited any liability (*responsabilité*) of a rail company for loss or damage in relation to transport its network. The company appropriated and, it seems (though this was yet to be investigated), used, a cargo of rails in transit, which was subject to a contract of carriage between a mining company and a third party. The mining company succeeded in unjustified enrichment against the company, because the alleged appropriation was unrelated to the performance of the carriage contract, ie, outwith the statutory exclusion. Almosnino’s contention that the *Cour de cassation* admitted the possibility of a delictual action by declaring that the statutory prohibition covered only carriage is tenuous. This was not pleaded or mentioned. And the post-war context makes it unlikely that the company’s appropriation of the rails would have been delictual.

¹⁰ CA Paris, 22 December 2017, RG n° 14/19086.

¹¹ CA Pau, 14 November 2017, RG n° 15/04720: ‘l’action fondée sur l’enrichissement sans cause, qui présente un caractère subsidiaire, ne doit être admise que dans les cas où le patrimoine d’une personne se trouve, sans cause légitime, enrichi au détriment de celui d’une autre personne qui ne jouit, pour obtenir ce qui lui est dû, d’aucune action naissant d’un contrat, d’un quasi contrat, d’un délit ou d’un quasi délit[;] qu’en l’espèce, l’absence de toute autre action ouverte au demandeur n’est pas caractérisée, étant constaté que le [demandeur] ne se prévaut ni des dispositions des articles 1382 et 1383 anciens du [C]ode civil dont l’applicabilité théorique ne peut être exclue [...]’. See also

thereby legally justified its decision'.¹² This approach dates to at least the 1920s.¹³ One well-known decision reached the opposite conclusion in the same circumstances. But it does not fit the trend in the cases, and still explicitly affirms in principle the *action de in rem verso*'s subsidiary character.¹⁴

Claims that unjustified enrichment is subsidiary to delict also exist in French scholarship.¹⁵ It is tacitly accepted by the current of *doctrine* which reasons on the broader bases outlined at the start of this subsection.¹⁶ More targeted claims about enrichment's subsidiarity to delict also exist, such as the following, under the heading of subsidiarity: 'if the impoverished person has [...] a *delictual* or *quasi-delictual* action based on articles 1240ff of the *Code civil*, he cannot also use the *action de in rem verso*.'¹⁷

C. Scotland

No Scots case supports unjustified enrichment's subsidiarity to the law of delict. None puts the language to any such rule. Scholarship is also against it.¹⁸ Robin Evans-Jones argues that pursuers may choose between delictual and enrichment-based claims,

¹² Civ 1re, 20 March 2014, pourvoi n° 12-28318: 'la cour d'appel qui, par motifs propres et adoptés, a fait application des principes relatifs à l'enrichissement sans cause et souligné son caractère subsidiaire rendant irrecevable la demande de Mme Y, a ainsi légalement justifié sa décision'. For other decisions using the vocabulary of subsidiarity whilst rejecting unjustified enrichment actions in the presence of legally barred delictual ones, see CA Aix-en-Provence, 4 December 2008, RG n° 07/20133; CA Paris, 15 September 2015, RG n° 1415549. Without the vocabulary, see Civ 3e, 8 June 1993, pourvoi n° 91-19076; Civ 3e, 14 February 1996, pourvoi n° 93-21791. In lower courts, see CA Orléans, 10 April 1985, Juris-Data n° 1985-044278; CA Metz, 14 March 2007, Jurisdata n° 2007-331358.

¹³ CA Paris, 8 March 1922; [1922] Ann prop indust artist et lit 379; [1922] RTD Civ 887, observations by Demogue.

¹⁴ Civ 1re, 3 June 1997, pourvoi n° 95-13568, *Bull civ I*, n° 182; [1997] RTD Civ 657, observations by J Mestre; [1998] JCP G, II, 10102, observations by G Viney.

¹⁵ Against was Paul Esmein: *Traité pratique de droit civil français par Marcel Planiol and Georges Ripert*, vol VII (P Esmein, J Radouant and G Gabolde eds, 2nd edn, LGDJ 1954) nos 762 *in fine*, 763(1). See also Almosnino (n 9) 115-121.

¹⁶ See, eg, A Rouast, 'L'enrichissement sans cause et la jurisprudence civile' [1922] RTD Civ 35, 89-91; or the survey and propositions put forward by P Drakidis, 'La "subsidiarité", caractère spécifique et international de l'action d'enrichissement sans cause' [1961] RTD Civ 577, esp 595, 600-601, 612-613.

¹⁷ F Terré et al and F Chénéde, *Droit civil: Les obligations* (12th edn, Dalloz 2018) no 1311 (original emphasis). See also, eg, the exposition of subsidiarity by J Bonnetcase, *Supplément au Traité théorique et pratique de droit civil par G Baudry-Lacantinerie et L-J Barde*, vol III (Sirey 1926) nos 145-156 esp 154, claiming specifically that delict trumps unjustified enrichment.

¹⁸ In addition to both accounts discussed fully, see also Eric Clive's view that there need only be a rule against double recovery in enrichment and delict: *Draft Rules on Unjustified Enrichment and Commentary – Appendix to Scottish Law Commission Discussion Paper No 99* (HMSO Scot 1994) rule 11(1)(c); and Martin Hogg's view that enrichment is not subsidiary to delict in the 'very small' category of cases in which they will both engage: *Obligations* (2nd edn, Avizandum 2006) [6.04].

because '[t]here is no definitional consumption' by delict of enrichment.¹⁹ Allowing this option 'does not normally undermine wider aims of the legal system'.²⁰ In support, Evans-Jones refers to Stair's separation of enrichments by 'engagement' or 'delinquence' from those arising lawfully but not by agreement; Barry Nicholas' view that French law permits a choice between enrichment and delictual claims; and the same author's citation of the *Bürgerliches Gesetzbuch*, article 852, which allows an enrichment action after a delictual one prescribes.²¹

In his long note on *Transco Plc v Glasgow City Council*,²² Niall Whitty addresses '[s]ubsidiarity; enrichment by act of party enriched and delict'.²³ With others, he instances, as an example of 'those cases where a claim for recompense has been rejected because of its alleged subsidiarity to the law of delict', the decision in *Exchange Telegraph Co v Giulianotti*.²⁴ But the case is nothing of the sort. A terminated his contract for advance information about horse racing with C and got B to breach its contract with C by continuing to provide A with the information that it wanted. Lord Guest held, in application, *inter alia*, of *Edinburgh & District Tramways Co Ltd v Courtenay*,²⁵ that C had suffered no loss.²⁶ This is a condition of the old action for recompense, not subsidiarity.²⁷ Despite his straw man, Whitty concludes that 'the

¹⁹ R Evans-Jones, *Unjustified Enrichment, I: Enrichment by Deliberate Conferral: Condictio* (W Green 2003) [1.101].

²⁰ R Evans-Jones, *Unjustified Enrichment, II: Enrichment Acquired in Any Other Manner* (W Green 2013) [7.24]-[7.26].

²¹ *ibid*, [7.25]-[7.26]; citing Stair – the version relied upon by the present writer being *The Institutions of the Law of Scotland* (2nd edn, Anderson 1693) I.7; and B Nicholas, 'Unjustified Enrichment in the Civil Law and Louisiana Law, I' (1961) 36 *Tulane L Rev* 605, 640-641; in turn critically discussing CA Paris, 8 March 1922 (n 13); and citing *Bürgerliches Gesetzbuch*, art 852. It is respectfully suggested that Nicholas' view of French law was questionable when expressed (the 1922 decision is actually against him), and is now unsupported by the cases.

²² [2005] CSOH 76, 2005 SLT 958.

²³ N Whitty, 'Transco Plc v Glasgow City Council: Developing Enrichment Law after Shilliday' (2006) 10 *Edinburgh L Rev* 113, 130.

²⁴ *ibid*, 130 and note 109; citing *Exchange Telegraph Co v Giulianotti* 1959 SC 19 (OH). Of 'those cases', this is the only one cited by Whitty. See also J Blackie and I Farlam, 'Enrichment by Act of the Party Enriched' in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (OUP 2004) 497 and note 208; citing *Exchange Telegraph*: 'A problem in Scots law has been an occasional tendency to reject claims under reference to some other area of law. In one case, for example, a claim was excluded on an analysis that saw it as subsidiary to the law of delict.' In their footnote, the authors continue: '[a]s in rejecting wrongly the claim where A received valuable information being marketed to B by C through getting B to pass it on to him in breach of his contract with C'.

²⁵ 1909 SC 99 (IH) 105 (Lord Dunedin).

²⁶ *Exchange Telegraph* (n 24) 26.

²⁷ In earlier solo work, John Blackie recognised this: 'Enrichment and Wrongs in Scots Law' [1992] *Acta Juridica* 23, 39. Why not later, in his work with Ian Farlam, is unclear: (n 24) 497 and note 208.

pursuer should be entitled to choose' between concurring delictual and enrichment actions.²⁸

II. ANALYSIS OF THE CLAIMS

In this second part of the chapter, the claims set out above are analysed. The framework for discussion is the principles of subsidiarity developed in chapter 2 of this study. The background is the conditional nature of subsidiarity, also developed in chapter 2, and both the law of unjust enrichment, and the general question of its subsidiarity, surveyed in chapters 1 and 3.

A. Existence

Once in place as an operative rule or principle, subsidiarity is not concerned to determine whether a given entity to which it applies actually exists. To be a rule of subsidiarity, it would seem necessary for a rule to create, maintain, or put an end to, a relationship of subsidiarity between entities. For a rule to destroy one or more of the entities the interaction of which it is supposed to manage might be thought to prevent it from carrying out these functions in relation to that entity. It would also seem to deal with a question of overlap in a less than conditional manner. And as argued in chapter 2, subsidiarity is an inherently *conditional* idea. Once an entity does not exist, there is no way for it eventually to become competent. Here, the relevant entities are, on one side, the law of tort or delict and relevant claims, and on the other, the law of unjust enrichment and unjust enrichment claims. The above French law and scholarship does not satisfy the instant principle.

The general claim found in French law and scholarship that *enrichissement injustifié* is subsidiary to open or legally barred delictual actions fails. Focusing particularly on the *Code civil*, the rule clearly makes the enrichment action disappear (the claimant 'has no action').²⁹ So it is not a rule of subsidiarity. The same reasoning applies to the more specific claims in particular cases and academic accounts.

²⁸ Whitty (n 23) 131.

²⁹ The partial exception to the obstacle of law bar, for *negotiorum gestio* in the *Code civil*, art 1301-5, makes no difference to the basic principle here. This issue is discussed further in chapter 9.

B. Plurality

A relationship of subsidiarity positively requires the existence of at least two entities, or groups of entities. Without a plurality of entities, no relationship would be possible at all in a given context, and whatever authority existed in that context would lie unconditionally with the only relevantly extant entity. The above French law and scholarship does not satisfy this principle.

In French law, and for the commentators there who favour subsidiarity in the context under discussion, the existence of an open delictual action means that there can be no *action en enrichissement injustifié*. The same is true when the former action is legally barred. In neither situation will more than one action relevantly exist. One thing cannot be in a relationship with another thing if one of those things does not exist. An enrichment action cannot be subsidiary to a delictual one if it does not exist.

C. Overlap

For a rule of subsidiarity to be relevant in any context, at least two entities in that context must be capable of overlapping if unrestrained. Otherwise, there would be nothing for a conditional rule of subsidiarity to do. The above French law and scholarship does not satisfy this principle.

The short point made in previous chapters applies again here. The French law and scholarship surveyed does not admit that delict and unjustified enrichment actions can co-exist. They deny that they can overlap – that is, concur. In so doing, they leave no role for subsidiarity. Accounts which leave no role for subsidiarity cannot sensibly be said to be about subsidiarity.

D. Meta-authority

For a rule of subsidiarity definitively to resolve questions of allocation and overlap, it must bind the relevant entities by constituting an independent, higher authority in relation to them. If this were not so, and the relevant entities could manage their relations without an independent, higher, organising rule (as, for example, would be

the case if one of them were sovereign and could dictate any relevant interactions), there would be no need for subsidiarity. This is subsidiarity as meta-authority. A rule of subsidiarity is what dictates whether the entities to which it applies have competence or authority, however they might behave if unrestrained. And the condition, howsoever framed, on which allocation takes place, goes to the general essence of subsidiarity. The above French law and scholarship does not satisfy the instant principle.

The rule in article 1303-3 of the *Code civil* is not a meta-authority in relation to the *action en enrichissement injustifié* or delictual actions. It is placed in the chapter of the *Code* on the enrichment action, of which it is an 'inherent condition'.³⁰ This is clearly reflected in the more specific reasoning addressed above, also. The *action de in rem verso* has a 'subsidiary character', which applies when it comes up against delictual actions.³¹ So the rule is not sourced independently of the former action, one of the entities to which it is supposed to apply. And it does not actually govern any potential delictual action which might come under its formula, either. It works by making the *action en enrichissement injustifié* disappear in the face of an action in delict, whether open or legally barred. The delict action decides for itself, so to speak, what it is, or is not, going to do, and there is nothing in article 1303-3 that can change that. The French commentary referred to above appears to accept that subsidiarity is part of the *action de in rem verso*. This suffices to declare all of it incorrect on the meta-authority point. Rules which are not independent, and cannot actually govern the things to which they apply, are not rules of subsidiarity.

³⁰ See Civ 1re, 4 April 2006, pourvoi n° 03-13986, *Bull civ I*, n° 194; [2006] RLDC, n° 28, 11, observations by S Doireau: 'le caractère subsidiaire reconnu à l'action fondée sur le principe de l'enrichissement sans cause ne constitue pas une fin de non recevoir au sens de l'article 122 du nouveau Code de procédure civile mais une condition inhérente à l'action'; CA Rennes, 18 December 2007, RG n° 06/00867; CA Nîmes, 8 January 2008, RG n° 04/01413; CA Basse-Terre, 5 January 2009, RG n° 05/01889; CA Douai, 26 October 2009, RG n° 08/06633; CA Limoges, 4 March 2013, RG n° 12/00560; CA Metz, 21 September 2017, RG n° 17/00339.

³¹ Recall, eg, Civ 1re, 20 March 2014 (n 12).

E. Not sovereignty

For a relationship of subsidiarity to exist, no entity said to be part of that relationship can be sovereign over any other entity in that relationship. In such a situation, there would be nothing for subsidiarity to do, because authority in that context would be allocated *unconditionally*. This goes against the essence of subsidiarity – as argued in chapter 2, subsidiarity is a *conditional* idea. The above French law and scholarship does not satisfy this principle.

This is another short point. The above French law, specific *jurisprudence*, and scholarship cited, takes the view that whenever delict exists, or did, until barred by an obstacle of law, it always wins against unjustified enrichment. There is no condition or doubt that there is no *enrichissement injustifié* on the field on which delict is, or was, at play.

F. Not concurrence

An extant relationship of subsidiarity is incompatible with the free concurrence of the entities said to be part of that relationship. Conditionality would be absent in such a situation, since competence would not be ordered in any way at all. The whole point of subsidiarity is to prevent concurrence which is happening, or might happen, as argued in chapter 2.

The French law and scholarship discussed here infringes the five foregoing principles of subsidiarity. Neither admits that unjust enrichment and delict can co-exist, or concur when not restrained by a meta-authority. Neither, therefore, breaches the instant principle of subsidiarity. This is only a small consolation, of course, since if there is no concurrence to prevent, subsidiarity is redundant, assuming that it is correct to say that subsidiarity exists in the first place, which, on the accounts here surveyed, it does not.

III. RE-ANALYSIS OF THE CLAIMS

This part of the chapter argues that subsidiarity is not relevant to the relationship of unjustified enrichment and delict in French law. In essence, they do not overlap, such that subsidiarity contributes nothing to how we understand their co-existence in the legal system.

Take definitions first. It appears that in France, delictual liability (*la responsabilité civile délictuelle*) is engaged by different analyses of facts to those which engage unjustified enrichment. It is important to focus on what, through French eyes, makes each a private injustice.³²

Delict is constituted by an unlawful act (*fait illicite*), the breach of a legal duty. From the defendant's point of view, this act is what creates the obligation; harm and loss (a *dommage* and *préjudice*) are caused to the claimant – imposed upon it.³³ Unjustified enrichment is still formally a *quasi-contrat* in French law. It is constituted by the lawful and voluntary act (*fait licite et volontaire*) of the claimant.³⁴ From the defendant's point

³² For what follows, see M Douchy, *La notion de quasi-contrat en droit positif français* (Economica 1997) 217-223; J Carbonnier, *Droit civil*, vol II (final def edn, PUF 2004) no 1213; F Chénéde, *Les commutations en droit privé: Contribution à la théorie générale des obligations* (Economica 2008) nos 342-347, emphasising the spontaneous nature of the quasi-contrat and the imposed nature of the (quasi-)délit; reflected shortly in Terré et al and Chénéde (n 17) no 1264, note 7; J Flour, J-L Aubert and E Savaux, *Les obligations, II: Le fait juridique* (14th edn, Sirey 2011) nos 1-2; F Terré, P Simler and Y Lequette, *Droit civil: Les obligations* (11th edn, Dalloz 2013) no 1029; M Fabre-Magnan, *Droit des obligations*, vol II (3rd edn, PUF 2013) 507-508. See also the detailed survey by F Chénéde, 'Charles Toullier, le quasi-contrat' [2011] RDC 305. The lawfulness-unlawfulness (*licéité-illicéité*) distinction is emphasised elsewhere: *Masdar (UK) v Commission* [2008] EUECJ C-47/07, [2009] 2 CMLR 1 (English text) [33], [45], [49], affirming [2006] EUECJ T-333/03 (French text) [69], [91]-[92].

³³ See now *Code civil*, arts 1235 (*dommage* and *préjudice*), 1239-1240 (causation); the different causes of delictual liability, 1241ff, all presuppose that these common requirements will be satisfied.

³⁴ Up to this point, the decision of a *Chambre mixte*, ruling on ex article 1371 of the *Code civil* (which did not require the enrichment of the debtor for a *quasi-contrat*), may be cited in our favour: Ch mixte, 6 September 2002, pourvoi n° 98-22981, *Bull mixte*, n° 4; BICC 15 October 2002, conclusions by R de Gouttes AG, report by J-P Gridel; [2002] LPA n° 213, 16, noted by D Houtcieff; [2002] JCP G, II, 10173, noted by S Reifegerste; [2002] D 2963, observations by D Mazeaud; [2003] RTD Civ 94, observations by J Mestre and B Fages, impliedly endorsing the distinction between the unlawful causation of harm (delict) and the lawful, voluntary, spontaneous act (quasi-contract). As the conclusions, report, and case notes cited show, this decision in the mail order prize draw cases (*l'affaire des loteries publicitaires*) was controversial. To award a sum represented to be payable on return of a confirmation form, but which was not guaranteed, it uses the concept of *quasi-contrat* instead of delict (the result is sometimes called a *quasi-contrat d'annonce de gain*, or *d'illusion de gain*). Despite criticism, see, more recently, Civ 1re, 19 March 2015, pourvoi n° 13-27414, *Bull civ I*, n° 67; [2015] RDC 861, observations by R Libchaber. For further discussion, see A Bénabent, *Droit des obligations* (17th edn, LGDJ 2018) nos 504-506. There is a special consumer regime, but without civil monetary redress (see now *Code de la consommation*, arts L121-7 7°, L121-20, L132-10ff). It could, however, re-open the way for a delictual

of view, this, and not its own act, is what creates the obligation, whilst *spontaneously* and unduly benefitting the defendant at the claimant's expense.³⁵

Secondly, and most importantly, the goals which each institution pursues differ. Delictual liability aims classically to compensate losses, with neither loss nor profit between the parties.³⁶ It has evolved more recently to fulfil other functions,³⁷ but none applies to unjustified enrichment.³⁸ This is a principle mandating 'the restitution of an undue benefit':³⁹ of gains surviving in the hands of the defendant *in good faith*.⁴⁰ It confers a right to the award 'of an amount equal to the enrichment or the impoverishment, whichever is the lesser', according to the *Code civil*, article 1303.⁴¹ But where the defendant behaves in bad faith, article 1303-4 changes the way in which the defendant's enrichment is valued.⁴²

analysis based on breach of statutory obligation once the French law of delict is reformed. See *Projet de réforme de la responsabilité civile* (2017) art 1242 (breach of statute), or art 1266-1 (punitive civil fines for deliberate wrongdoing designed to be profitable).

³⁵ See now *Code civil*, art 1300: 'Quasi-contracts are purely voluntary actions which result in a duty in a person who benefits from them without having a right to do so [...]' ('Les quasi-contrats sont des faits purement volontaires dont il résulte un engagement de celui qui en profite sans y avoir droit [...]').

³⁶ Civ 2e, 5 July 2001, pourvoi n° 99-18712, *Bull civ II*, n° 135; Civ 2e, 23 January 2003, pourvoi n° 01-00200, *Bull civ II*, n° 20; [2003] JCP G, II, 10110, noted by J-F Barbiéri. See also, *ex multis*, Civ 2e, 9 July 1981, pourvoi n° 80-12142, *Bull civ II*, n° 156: 'le propre de la responsabilité civile est de rétablir aussi exactement que possible l'équilibre détruit par le dommage et de replacer la victime dans la situation où elle se serait trouvée si l'acte dommageable ne s'était pas produit'.

³⁷ Failure to recognise this evolution leads one author to argue that delict only compensates for loss, to the exclusion of unjustified enrichment, which can operate once delict is exhausted, 'only to restore profits which exceed the amount of the loss compensated by *la responsabilité civile*'. For him, this makes unjustified enrichment not subsidiary, but complementary, to delict: CP Filios, *L'enrichissement sans cause en droit privé français* (Bruylant 1999) no 540. This amounts to conferring on unjustified enrichment a punitive function, and the author does not overcome the difficulty that, on orthodox French legal principles, it fulfils no such purpose.

³⁸ *Projet de réforme de la responsabilité civile* (n 35) arts 1258 (compensation [*réparation*]), 1266 (cessation and prevention), 1266-1 (punishment [*punition*]). For commentary on delict's voyages beyond compensation, see, in particular, S Carval, *La responsabilité civile dans sa fonction de peine privée* (LGDJ 1995): punishment; C Thibierge, 'Libres propos sur l'évolution du droit de la responsabilité' [1999] RTD Civ 561: prevention; C Bloch, *La cessation de l'illicite* (Dalloz 2008): cessation; C Sintez, *La sanction préventive en droit de la responsabilité civile* (Dalloz 2011): prevention. See also B Girard, *Responsabilité civile et droits fondamentaux* (LGDJ 2015).

³⁹ CA Paris, 22 December 2017 (n 10): 'l'action "de in rem verso" a pour finalité la restitution d'un profit indû'.

⁴⁰ Civ 1re, 11 March 2014, pourvoi n° 12-29304, *Bull civ I*, n° 37; [2014] RDC 622, noted by R Libchaber: 'la bonne foi de l'enrichi ne prive pas l'appauvri du droit d'exercer contre celui-là, l'action *de in rem verso*'.

⁴¹ See previously, eg, Civ 1re, 19 January 1953, *Bull civ I*, n° 21; [1953] D 234.

⁴² For other illustrations of disgorgement in French law, see *Code de la propriété intellectuelle*, arts L331-1-3, L615-7.

‘Impoverishment established on the day that it occurred, and enrichment such as it subsists on day of the claim, are valued on the day that the court gives judgment. If the enriched person was in bad faith, restitution is equal to the higher of these two values.’

Taking *all* the defendant’s original profits seems to prevent an analysis in loss-based terms, because any link between the remedy and the claimant’s situation is ignored. And the quantum of any award against a bad faith defendant potentially surpasses that to which unjustified enrichment gives access – gain surviving. This seems, therefore, to be a punitive application of the law of delict to disgorge unlawful profits obtained in bad faith.⁴³

We see here, then, that delict and unjustified enrichment exist in proximity. In one sense, cartographically, they may appear close to one another, even in the same chapter of the *Code civil*. In another sense, theoretically, they can arise on the same facts. But it is submitted that in French law, as the *Cour de cassation* appears to have recognised at least once,⁴⁴ these institutions are not of concurrent application. Since they cannot overlap, subsidiarity cannot clarify their interrelationship.

CONCLUSION

This chapter first surveyed English, French and Scots law for claims that unjust enrichment is subsidiary to tort or delict. Only French law and scholarship disclose findings to evaluate. English law has not considered the question specifically, and is unlikely to do so. English and Scots scholarship is against subsidiarity in this context.

The second part of this chapter suggested that accounts which claim that unjust enrichment is subsidiary to delict are wrong. First, what French law and scholarship

⁴³ For agreement, citing the present writer’s unpublished work, see O Deshayes, T Genicon and YM Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations – Commentaire article par article* (2nd edn, Lexis Nexis 2018) 636-637.

⁴⁴ Com, 16 July 1968, *Bull civ* IV, n° 243. In that case, the *Cour de cassation* explicitly denied any overlap between unjustified enrichment and delictual actions in approving a lower court’s double award under *two separate heads of injustice*: first, in unjustified enrichment, for a period of unauthorised, but not delictual, occupation of premises; and secondly, in delict, for a subsequent attempt by the defendant to divert clientele to his new premises, away from the business in the premises he previously occupied.

take to be rules of subsidiarity determine the existence of unjustified enrichment, an entity said to be in a relationship of subsidiarity. Rules of subsidiarity do not do that. Secondly, they do not admit that unjustified enrichment and delictual actions can exist at the same time, such that there is never a relevant plurality of entities, required for a relationship of subsidiarity. Thirdly, they do not admit that unjust enrichment and delictual claims can overlap, without the possibility of which subsidiarity is redundant. It was further suggested that each institution is definitionally and functionally distinct, such that their overlap is not possible, anyway. Fourthly, French law and scholarship do not see what they take to be rules of subsidiarity as meta-authorities, which they must be if they are truly to be rules of subsidiarity. Fifthly, they see delict as somehow sovereign over unjustified enrichment – something antithetical to subsidiarity. It is conceded that this study's sixth principle of subsidiarity is not infringed. But that is only because the material discussed does not successfully surmount hurdles logically prior to its relevance.

The third part of this chapter examined the definitions and functions of delictual liability and unjustified enrichment in French law. It suggested that subsidiarity is irrelevant to the relationship between them.

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CHAPTER 8

UNJUST ENRICHMENT, SUBSIDIARITY, AND OBSTACLES OF FACT

Previous chapters in this study provide background on the law of unjust enrichment, introduce a definition and principles of subsidiarity, and sketch the history of, and reasons for, subsidiarity in the law and scholarship on unjust enrichment. This chapter is the fifth to put those general chapters to use. It addresses material, found only in French law and literature, about *enrichissement injustifié*'s subsidiarity in situations where an obstacle of fact bars a claimant's action against a primary debtor, and (i) an *action de in rem verso* is then allowed against an indirect party enriched, or (ii) where, at one time, an action against the primary debtor is barred by obstacle of fact, and an *action de in rem verso* is *later* allowed against *the same* debtor. There is no material in either English or Scots law and scholarship to evaluate. In the first part of this chapter, a central claim is framed. This is then tested against the theory of subsidiarity developed in chapter 2 of this study. The claim cannot correctly be characterised as addressing the subsidiarity of unjustified enrichment in France. The third part of this chapter re-analyses the sources, in order better to understand what is happening in this context.

I. THE CLAIM

From the available material, this part of the chapter constructs a claim about *enrichissement injustifié*'s subsidiarity and the obstacle of fact bar. There is much relevant law and scholarship, old and new.

A. French law

As shown in chapter 3, article 1303-3 of the *Code civil*, and the *Cour de cassation*'s formulae from which it derives, are claims or rules about the subsidiarity of the *action de in rem verso* in France. Though they do not themselves use the language of subsidiarity, many *other* sources, referred to earlier, do put it to the now-codified rules. Article 1303-3 provides:

'The impoverished person has no action on this basis [ie, in unjustified enrichment] where another action is open to him or is barred by an obstacle of law, such as prescription.'

The rule which interests us here appears from an *a contrario* reading of this provision:¹ if an obstacle *of fact* prevents the success of another action, then the *action en enrichissement injustifié* may still lie. Instead of being a bar to unjustified enrichment, this rule is, rather, a permission to invoke it. The distinction between obstacles of law and fact, with the language of subsidiarity, dates to at least 1949 in the cases,² and persists in the twenty-first century.³ Also common is the vocabulary of subsidiarity with one or other kind of obstacle *alone*.⁴

The usual obstacle of fact is the insolvency of a person against which a non-enrichment-based action is available.⁵ Use of the *action de in rem verso* in this situation dates at least to the 1860s.⁶ The issue may even have been under the surface

¹ O Deshayes, T Genicon and Y-M Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations – Commentaire article par article* (2nd edn, Lexis Nexis 2018) 634. Philippe Rémy has said that 'it seemed unnecessary to burden the text' of an identical reform proposition 'by pronouncing a particular rule, settled in the law': 'Des autres sources d'obligations' in F Terré (ed), *Pour une réforme du régime général des obligations* (Dalloz 2013) 45.

² CA Orléans, 5 January 1949; [1949] S, II, 64. The court distinguished an '*obstacle juridique*' from a '*simple obstacle de fait*' by reference to the '*caractère subsidiaire*' of the *action de in rem verso*, and its status as a '*voie subsidiaire*'.

³ CA Grenoble, 27 May 2010, RG n° 07/03382; CA Montpellier, 29 September 2011, RG n° 10/08133; CA Aix-en-Provence, 21 November 2017, RG n° 16/01803.

⁴ Soc, 5 November 2009, pourvoi n° 08-43177; [2010] Bull Joly Soc 462, observations by P Le Canu (law); CA Caen, 31 May 2018, RG n° 16/02993 (law); CA Bastia, 30 May 2018, RG n° 17/00368 (law); CA Nîmes, 13 September 2012, RG n° 09/02741 (fact).

⁵ For the vocabulary in this context, see, with other cases cited here, Civ 1re, 25 March 2003, pourvoi n° 00-15449.

⁶ Cour de Montpellier, 5 February 1869; [1869] D, II, 213: *action de in rem verso* of tutor against minor children when parents insolvent. Compare Cour de Paris, 17 November 1838; [1839] D, II, 33. See also Trib rég sup de Darmstadt, 20 April 1895; [1897] DP, II, 332: successful *action de in rem verso* against

in the famous *affaire Boudier* of 1892.⁷ There, a lease between a tenant farmer and a landowner was terminated. The parties agreed that the tenant would abandon to the landowner what crops remained, partly to satisfy outstanding rent. A fertiliser merchant, who had delivered to the tenant before the lease ended, was granted an *action de in rem verso* against the landowner. In his note on the decision, published in the *Recueil Sirey*, Joseph-Emile Labbé elaborates.⁸ His account of counsel for the landowner's argument suggests that the tenant's contract with the landowner may have stipulated that the tenant would put manure on the land, and take all proper steps to render it more fertile. Labbé also tells us that the *rapport* written for the court by one of its judges, *Conseiller* Loubers, clarifies, first, that the experts, appointed to draw up an account on the termination of the lease between the landowner and the tenant, estimated the value of the harvest *minus* the fertiliser's value. They assumed that the landowner would only have the harvest by paying for the benefit of the merchant's wares. Secondly, Loubers' *rapport* raises the fact of the tenant's insolvency. Labbé then says:⁹

'These two details are not without importance in determining the conditions on which the *action de in rem verso* was granted, and in helping to theorise it. We think that the true principle to which it is necessary to adhere is that a person should not enrich itself *without juste cause* at another's expense. [...] It would not have been fair for the landowner to keep the entire harvest, valued with the fertiliser deducted, when the fertiliser merchant could not have obtained its value due to the farmer's insolvency.'

Perhaps Labbé was right that the tenant's insolvency weighed in the court's considerations. Certainly, it appears that the *Chambre des requêtes* ignored the (practically useless) contractual relationship within which the unpaid merchant

bathroom owner benefitting from urgent repair works by a carpenter in contract with the owner's insolvent tenant; Trib civ de Marseille, 24 January 1907; [1907-1912] *Tables quinq Gaz Pal* 369: 'the *action de in rem verso* must be subject to the condition that the claimant have no other action against another person or, at the very least, that the competing action be paralysed by the known insolvency of the debtor or rendered ineffective by any other analogous circumstance'.

⁷ Req, 15 June 1892; [1892] DP, I, 596; [1893] S, I, 281, noted by J-E Labbé.

⁸ On Labbé's contribution to unjustified enrichment in France, see noted lawyer and politician Gaston Monnerville's thesis: *Labbé et la théorie de l'enrichissement sans cause* (Falandry 1921); and F Chénédé, 'Joseph-Émile Labbé, l'enrichissement sans cause' [2011] RDC 1005.

⁹ [1893] S, I, 281, 282 (second column, original emphasis).

conferred the benefit of the fertiliser on the insolvent tenant, and the stipulation in the terminated landowner-tenant contract, pursuant to which the tenant apparently acted to the landowner's advantage. Insolvency seems to have been relevant in a 1898 decision, too, still early in the *action de in rem verso*'s development. The *Chambre civile* of the *Cour de cassation* held that a landowner, whose contract with his tenant farmer stipulated a right to a portion of any harvest, was not unjustifiably enriched at the expense of an unpaid harvester who contracted with tenant, and that the harvester already had a 'direct debtor'.¹⁰ This suggests that (though the judgment does not mention insolvency) the tenant was not just the *direct*, and *correct*, debtor, but a *solvent one*.

From these early clues about insolvency in the multi-party context, we may jump to 1940, and the *arrêt Gorge*, the first French case in which the *Cour de cassation* used the phrase *caractère subsidiaire* in relation to the *action de in rem verso*. An affordable housing company sold land to one Bourse. The company then concluded a construction contract with a builder, Gorge. Bourse, the buyer of the land, was the intended beneficiary of the works: the construction contract stipulated that he would pay for them. That contract also allowed the company's architect to authorise supplementary works; and following any authorisation, the builder could not refuse to undertake them. Bourse never paid, either the housing company under the contract of sale, or Gorge, for supplementary works ordered under the construction contract. The housing company rescinded the sale and retook the land, benefitting from the supplementary works for which Gorge had received no payment. But Bourse was insolvent. The court below granted the contractor an *action de in rem verso* against the company. The *Cour de cassation* said:¹¹

¹⁰ Civ, 18 October 1898, [1899] DP, I, 105, noted by LS.

¹¹ Req, 11 September 1940; [1940] Gaz Pal, II, 114; [1941] S, I, 121, noted by P Esmein: 'Attendu, d'autre part, que le tribunal, après voir admis l'existence d'une action contractuelle contre le bénéficiaire Bourse des travaux supplémentaires, ayant expressément subordonné la condamnation prononcée contre la société en raison de l'enrichissement sans cause du fait de la reprise par elle de l'immeuble, au cas de l'insolvabilité de Bourse rendrait vaine la condamnation prononcée contre lui, a nettement affirmé ainsi le caractère subsidiaire de l'action *de in rem verso* contre la société [...] le jugement [...] a, sans dénaturer l'action *de in rem verso*, justifié légalement sa décision [...]' That (i) the company was in contract with Gorge, and (ii) the powers of the company's architect, are both clear from the Court's exposition of the first ground of appeal, which addressed whether the contract was one for a fixed price, to which *Code civil*, art 1793 applied (it did not).

‘Considering [...] that the court below, having admitted the existence of a contractual action against Bourse, the beneficiary of the supplementary works, [and] having expressly conditioned the judgment against the company on the basis of its unjustified enrichment due to its retaking of the property, on the insolvency of Bourse, such that judgment against him would be in vain, has in so doing clearly affirmed the subsidiary character of the *action de in rem verso* against the company [...] the judgment [...] has, without misapplying the *action de in rem verso*, legally justified its decision [...].’

Here, then, is a foundational case. It discloses an initial theme for this chapter in four points:

- (i) where A confers a benefit upon B, who is contractually obliged to A in respect of it;
- (ii) A may sue a third party enriched, C, for the value of that benefit; if
- (iii) B is insolvent; and
- (iv) this is concerned with the subsidiarity of the *action de in rem verso*.

Two ancillary details before variations on the initial theme. First, in 2000, the *Chambre commerciale* of the *Cour de cassation* held, in a multi-party situation, that where a claimant could have sued a person other than the primary debtor outwith unjustified enrichment – the primary debtor had guarantors, who had not been sued, but merely put on notice, and whose insolvency had not been established – no *action de in rem verso* lay against a *fourth* party enriched.¹² This raises a second point: what is required to establish the relevant insolvency? A primary debtor’s entry into insolvency proceedings suffices,¹³ if this shows that a claimant will receive no satisfaction.¹⁴

¹² Com, 10 October 2000, pourvoi n° 98-21814, *Bull civ* IV, n° 150; [2000] D 409, noted by V Avena-Robardet; [2001] RTD Civ 591, observations by J Mestre and B Fages.

¹³ Civ 3e, 25 March 1998, pourvoi n° 96-18641, though no action on the ‘subsidiary basis’ of unjustified enrichment on the facts. The claimant had already declared participation in the insolvency procedure, with the result that it had a *créance* – an asset – which it could eventually satisfy. See also Civ 1re, 14 January 2003, pourvoi n° 01-01304, *Bull civ* I, n° 142; [2003] Defrénois 259, noted by J-L Aubert; [2003] RTD Civ 297, observations by J Mestre and B Fages: contractor suing owner of land benefitting from improvements made before an aborted land sale to the contractor’s insolvent primary contractual debtor.

¹⁴ Civ 1re, 18 October 2017, pourvoi n° 16-22582; [2017] Ess dr banc, Dec, 7, observations by M Mignot: based on ‘the subsidiary character of the *action de in rem verso*’, no action against a third party where

However, this general rule seems to have been tempered where considerable unfairness to the enrichment defendant might result.¹⁵

The fourth element of the initial theme here – subsidiarity – is constant. The first three are not. We turn now to developments in the cases in relation to each.

First variation: B need not be contractually obliged to A

In the *Gorge* case, Bourse was contractually obliged to the builder. Let us examine a decision in which there was a relevant statutory obligation on person B instead.¹⁶ We will return to it in part III of this chapter, so will call it the *Case of the False Father*. A woman's first husband contributed to the upkeep of the woman's child, whom he thought was his daughter. The woman and her second husband successfully contested the first husband's paternity. So the husband's payments were made without legal ground, because the statutory parental obligation on the basis of which they were made became retroactively null.¹⁷ Since the mother was insolvent, and recourse against her practically useless, the first husband successfully sued the *second* husband, and true father, in unjustified enrichment.

Second variation: obstacles of fact are relevant in two-party cases

The *Gorge* case, and most of the decisions cited in this chapter, concerned at least three parties.¹⁸ But this is not necessary, as shown by a decision in the family context from 2007. We will return to this case in part III of this chapter, too, so will call it the *Case of the Kindly Aunt*. During the 1980s, Mr X left the country. His sister, Ms Y, brought up his daughter. Much later on, the siblings fell out. X sued Y over the repayment of a loan. Y replied that X should compensate her for costs related to

the primary debtor was in liquidation, but no attempt had been made to enforce a court judgment for repayment of a loan.

¹⁵ Civ 1re, 5 November 2008, pourvoi n° 07-18123: bank should first have attempted to enforce a judgment against a fraudster before suing his apparently unwitting father in enrichment, into whose account monies were transferred.

¹⁶ Civ 1re, 1 February 1984, pourvoi n° 82-15496, *Bull civ I*, n° 45; [1984] D 388, noted by J Massip; [1984] RTD Civ 712, observations by J Mestre.

¹⁷ For the parental *obligation d'entretien*, see now *Code civil*, arts 371-1 and 371-2.

¹⁸ There were many persons on the facts, but three key parties, in Civ 1re, 18 October 2017 (n 14), for example.

looking after her niece. She sued in unjustified enrichment. The *Première chambre civile* approved the court below for allowing her action. X had argued that Y should have asked a judge to arrange for her to receive support for bringing up her niece back in the 1980s. But in 1982, X had written to a family judge to say that he had no income whatever, and had to leave the country to find work. So at the material time, Y could never have obtained support from X. In so reasoning, the court of appeal had ‘legally justified its decision in relation to the subsidiarity of the *action de in rem verso*’.¹⁹

Third variation: obstacles of fact other than insolvency

The *Gorge* case involved the insolvency of the primarily liable person – Bourse. But other obstacles of fact have appeared before the courts. The *Case of the Kindly Aunt* involved the *absence* and *destitution* of Mr X. Insolvency goes unmentioned. Take, also, a 2012 case before the *Cour d’appel* of Nîmes. There, some of the funds obtained in a cheque fraud had been diverted abroad by one group of wrongdoers. And a ‘subsidiary’ unjustified enrichment action was allowed against other parties, in the jurisdiction, who had also benefitted from the scheme.²⁰ We can also instance a 2017 decision of the *Cour d’appel* of Riom, in which a primary defendant’s lack of known domicile constituted an obstacle of fact, with the result that an unjustified enrichment action was allowed against another.²¹

This concludes the sketch of law and *jurisprudence* relevant to this chapter. We now briefly survey treatment of obstacles of fact and subsidiarity in French unjustified enrichment scholarship.

¹⁹ Civ 1re, 3 May 2007, pourvoi n° 05-19454; [2007] RTD Civ 765, observations by J Hauser: ‘Mais attendu que l’arrêt retient que Mme Y ne pouvait solliciter auprès du juge des tutelles le versement d’une pension alimentaire pour l’éducation et l’entretien de l’enfant Loreleï, que M X, qui avait écrit le 27 décembre 1982 au juge des tutelles ne disposer d’aucune source de revenus et devoir quitter la France pour rechercher un emploi et qui n’a par la suite donné aucune nouvelle auprès de sa tante et de sa fille avant sa lettre du 1er décembre 1988, était dans l’impossibilité absolue, tant matérielle que financière, de pourvoir à l’éducation de sa fille, en sorte que Mme Y ne disposait, au moment de l’ouverture de la tutelle et pendant toute la durée de celle-ci, d’aucune possibilité de réclamer le versement par M X d’une contribution à l’éducation de l’enfant qui lui était confiée; Que la cour d’appel a ainsi légalement justifié sa décision au regard de la subsidiarité de l’action *de in rem verso*’.

²⁰ CA Nîmes, 13 September 2012 (n 4).

²¹ CA Riom, 13 mars 2017, RG n° 15/02796.

B. French Scholarship

Where the distinction between obstacles of law and fact originates is uncertain. In the materials of most interest in this study, the terminology dates at least to the fourth (1873) edition of Charles Aubry and Charles-Frédéric Rau's *Cours de droit civil français*, on a note unrelated to subsidiarity, but still concerned with unjustified enrichment.²² The substance of the rule which interests us here has been discussed for over a century. So, in the *Revue trimestrielle de droit civil*'s first article on unjustified enrichment, Georges Ripert and Raymond Teisseire state that, in three-party situations, where the primary debtor is contractual, and solvent:²³

'[A claimant] will not hesitate to use this route rather than the action *de in rem verso*, less sure of success and less advantageous in its result. So, in situations of this type, the action *de in rem verso* will function as a subsidiary action and will only be brought where the direct debtor is insolvent.'

For these authors, there was no hard and fast rule. This was a practical matter. Opinion in early twentieth century doctoral theses varies, and at most only partially discloses today's principles.²⁴

²² C Aubry and CF Rau, *Cours de droit civil français d'après la méthode de Zachariae*, vol VI (4th edn, LDJ 1873) no 578(4): 'L'action *de in rem verso* tend à la restitution de l'objet même, dont l'un des patrimoines a été dépouillé au profit de l'autre, lorsque aucun obstacle de fait ou de droit ne s'oppose à cette restitution en nature, et au cas contraire, à la restitution de la valeur qui en forme la représentation.'

²³ G Ripert and R Teisseire, 'Essai d'une théorie de l'enrichissement sans cause en droit civil français' [1904] RTD Civ 727, 776-778 esp 778.

²⁴ See, eg, V Poltzer, *L'enrichissement sans cause* (Sirey 1912) 96-97: vocabulary of subsidiarity and indirect enrichment actions where a party is insolvent, but as a practical matter; E Bouché-Leclercq, *De l'action "de in rem verso" en droit privé* (Sirey 1913) 184-193 esp 191: idea that the action *de in rem verso* is a 'subsidiary action' à la Aubry and Rau is superfluous, but a primary action against a primary debtor must be used first, and if the primary debtor is not insolvent, the claimant is not impoverished, and there is no action *de in rem verso*; M Possa, *L'enrichissement sans cause* (Giard & Brière 1916) 177-179 esp 179: insolvency of a primary debtor not concerned with 'whether the action *de in rem verso* is subsidiary or not, but with whether there is harm to the claimant's patrimony'. This is absent if the claimant 'has another action successfully to invoke, whether against a third party, or the defendant to the action *de in rem verso* itself'. ('[C]e qui intéresse la Cour de cassation, ce n'est pas de savoir si l'action *de in rem verso* est subsidiaire ou non, mais le fait de savoir s'il y a ou non lésion dans le patrimoine du demandeur. Or, cette lésion n'existe pas tant qu'il a une autre action à exercer utilement, soit contre un tiers, soit contre le défendeur même à l'action *de in rem verso*.')

The work most likely responsible for the modern currency of the obstacle of law-fact distinction, and the rule which concerns us, is the fifth (1917) edition of Aubry and Rau's *Cours*, annotated by Etienne Bartin. In a footnote to the Strasbourg professors' famous formula,²⁵ employed in the *arrêts Clayette and Briauhant*,²⁶ Bartin explains that it can variously be understood: no *action de in rem verso* unless there is no other action on the facts, whether against the enrichment defendant or a third party; no *action de in rem verso* unless that other action is now lost; or, asks Bartin, and most interestingly for present purposes, did Aubry and Rau mean:²⁷

'[T]hat the claimant can succeed, even if an action of this type [ie, one other than an action *de in rem verso*, against the enrichment defendant or a third party] exists to his advantage, and continues to exist, but only where it is devoid of all utility due to the insolvency of the person against whom it could be brought?'

Bartin does not actually conclude in favour of any of the possibilities put forward. But the great authority of Aubry and Rau's *Cours*, and the quality of Bartin's continuation,²⁸

²⁵ See, eg, *Cours*, 4th edn (n 22) no 578(4): 'L'action *de in rem verso*, dont on ne trouve au Code civil que des applications spéciales, doit être admise d'une manière générale, comme sanction de la règle d'équité, qu'il n'est pas permis de s'enrichir aux dépens d'autrui, dans tous les cas où le patrimoine d'une personne se trouvant, sans cause légitime, enrichi au détriment de celui d'une autre personne, celle-ci ne jouirait, pour obtenir ce qui lui appartient ou ce qui lui est dû, d'aucune action naissant d'un contrat, d'un quasi-contrat, d'un délit ou d'un quasi-délit.' The most relevant part of the formula was slightly different, and actually clearer, in the first three editions. See C Aubry and CF Rau, *Cours de droit civil français, traduit de l'allemand de M CS Zacharie, revu et augmenté, avec l'agrément de l'auteur*, vol IV (1st edn, Lagier 1844) no 576; C Aubry and CF Rau, *Cours de droit civil français, traduit de l'allemand de M CS Zacharie, revu et augmenté, avec l'agrément de l'auteur*, vol II (2nd edn, Meline, Cans et Cie 1850) no 576; C Aubry and CF Rau, *Cours de droit civil français: d'après l'ouvrage allemand de C-S Zachariae*, vol V (3rd edn, LDJ 1857) no 576 (emphasis added): '[U]ne personne peut même [...] exercer efficacement le droit de revendication dont jouit tout propriétaire, en ce sens qu'elle est autorisée à réclamer, au moyen de l'action *de in rem verso*, les valeurs dont le patrimoine d'une autre personne s'est enrichi au détriment du sien, et pour la restitution desquelles elle n'aurait à exercer aucune action naissant d'un contrat, d'un quasi-contrat, d'un délit ou d'un quasi-délit.'

²⁶ Discussed in chapter 3: Civ, 12 May 1914; [1914] D Chron 56; [1914] Pandectes, Bull somm, I, 86; [1918] S, I, 41, noted by E Naquet; Civ, 2 March 1915; [1915] S, Bull somm, I, 20; [1920] DP, I, 102 (first case).

²⁷ E Bartin (ed), *Cours de droit civil français d'après la méthode de Zachariae par C Aubry et C Rau*, vol IX (5th edn, LDJ 1917) no 578(4) note 10: 'Ou bien enfin ce caractère subsidiaire signifie-t-il que le demandeur peut réussir, même si une action de ce genre est née à son profit, même s'il l'a conservée, mais seulement dans le cas où elle se trouve dépourvue de toute efficacité par suite de l'insolvabilité de celui contre qui elle pouvait être dirigée?'

²⁸ A Tunc, 'Book Review' (1956) 69 Harvard L Rev 1157, 1158: 'The impact of this treatise on French law has been unrivalled. [...] Although Bartin was a man of extraordinarily strong personality, his respect for the work of Aubry and Rau was such that he did not dare to alter the text of the fourth edition. He reproduced it without change except to bring it up to date by additions, and sometimes to add criticisms,

likely contributed to the eventual development of the insolvency hypothesis, and today's wider obstacle of fact rule. Support for this derives from the first serious doctrinal attempt to elaborate the subsidiary character of the *action de in rem verso* according to a distinction between obstacles of law and fact. André Rouast acknowledged his debt to Bartin's footnote in arguing that the *action de in rem verso* would not lie where another action would, or when that action was blocked by an obstacle of law, or an obstacle of fact, *unless* that obstacle of fact was external to the claimant. His leading example of this was another person's insolvency, as distinct from the claimant's fault.²⁹ Rouast's attenuation went too far for one contemporary author.³⁰ But another accepted it.³¹ And it has survived through the decades in other accounts, whether or not they accept Rouast's precise model, and which the *Code civil* now endorses in its article 1303-3.³²

C. Summary and generalisation

The obstacle of fact permission is clearly a rule of subsidiarity in French eyes. However, the *Code civil* is silent. The cases disclose no general exposition accommodating all of the variations discussed. Scholarly approaches differ in detail,

between brackets in the text or, more often, in footnotes – long powerful footnotes, some of which themselves became famous pieces of legal literature.'

²⁹ A Rouast, 'L'enrichissement sans cause et la jurisprudence civile' [1922] RTD Civ 35, 82-91, esp 84, note 2, 86-89. Rouast's model is replicated exactly without citation in CA Orléans, 5 January 1949 (n 2); and, in a notable decision of the Trib civ de Florac, 17 June 1952; [1953] D 261, his article is referenced repeatedly in the court's exposition of the law, and it clearly influenced the formulation of the subsidiarity condition.

³⁰ J Bonnetcase, *Supplément au Traité théorique et pratique de droit civil par G Baudry-Lacantinerie et L-J Barde*, vol III (Sirey 1926) nos 146, 153.

³¹ R Demogue, *Traité des obligations en général*, vol III (LNDJ 1923) no 175. This was actually the only rule of subsidiarity which Demogue accepted, because he thought subsidiarity was simply needed to prevent needless litigation (*économie des moyens*).

³² Not using the distinction between obstacles of law and fact, see, eg, P Esmein (ed), *Aubry & Rau: Cours de droit civil français*, vol IX (6th edn, Libraries Techniques 1953) nos 577-578(5); P Esmein, *Traité pratique de droit civil français par Marcel Planiol and Georges Ripert*, vol VII (P Esmein, J Radouant and G Gabolde eds, 2nd edn, LGDJ 1954) nos 761-763; P Drakidis, 'La "subsidiarité", caractère spécifique et international de l'action d'enrichissement sans cause' [1961] RTD Civ 577, 586-587, 601-603, 613; F Chabas (ed), *Leçons de droit civil de H, L et J Mazeaud*, vol II/1 (9th edn, Montchrestien 1998) no 707; J Carbonnier, *Droit civil*, vol II (final def edn, PUF 2004) nos 1224(a), 1228(c); J Flour, JL Aubert and E Savaux, *Les obligations, II: Le fait juridique* (14th edn, Sirey 2011) no 55; F Terré, P Simler and Y Lequette, *Droit civil: Les obligations* (11th edn, Dalloz 2013) no 1073-1; (12th edn, with F Chénéde, Dalloz 2018) nos 1309-1314. Using it faithfully, see, eg, G Marty and P Raynaud, *Droit civil: Les obligations*, vol I (2nd edn, Sirey 1988) no 398; B Starck, H Roland and L Boyer, *Droit civil: Les obligations*, vol II (6th edn, Litec 1998) nos 2207-2210 esp 2210; P Malaurie, L Aynès and P Stoffel-Munck, *Droit des obligations* (10th edn, LGDJ 2018) no 1071. Partial use, post the 2016 reform: A Bénabent, *Droit des obligations* (17th edn, LGDJ 2018) no 489; B Fages, *Droit des obligations* (8th edn, LGDJ 2018) no 480.

and appear insufficient. In particular, the point that obstacles of fact might be relevant in two party cases seems insecure.³³ And the acceptance of obstacles of fact beyond insolvency is rare.³⁴ Since a definitive formulation of the claim which this chapter seeks to address is lacking, the following is suggested as a point of reference for the rest of this chapter:

- (i) A claimant may sue a defendant in *enrichissement injustifié* where another action is open to the claimant, but that action is rendered practically useless by an obstacle of fact;
- (ii) The basis of the claimant's non-enrichment-based action may vary, and need not be contractual;
- (iii) The claimant's non-enrichment-based action may lie against the same person as the *action en enrichissement injustifié*;
- (iv) Whilst the main obstacle of fact is insolvency, others, such as the absence of a defendant, are valid; and
- (v) The foregoing is part of the subsidiary character of today's *action en enrichissement injustifié*.

We can now test this claim, before its re-analysis in the third part of this chapter.

³³ One leading account appears to deny it, explaining that obstacles of fact are only relevant to indirect enrichment cases: Terré, Simler and Lequette (n 32) no 1073-1; F Terré et al and F Chénédé, *Droit civil: Les obligations* (12th edn, Dalloz 2018) no 1312 note 2. Bardin, however, did not discount it, as shown from his remark that the obstacle of fact permission 'ne vaudra qu'autant que l'action donnée à l'auteur de l'enrichissement, soit contre le défendeur éventuel à l'action *de in rem verso*, soit contre un tiers, ne résultera pas d'un contrat': (n 27) no 578(4) note 10. Rouast only denied it because he considered that the real obstacle in two party cases would be a *legal* one, namely the principle of equality between unsecured creditors: (n 29) 88-89. But the *Case of the Kindly Aunt*, Civ 1re, 3 May 2007 (n 19), has shown that this will not always be a concern.

³⁴ But see, accepting other possibilities, Trib civ de Marseille, 24 January 1907 (n 6): insolvency or 'any other analogous circumstance'; Trib comm de Paris, 10th chamber, 13 September 2010, n° 2008012046; [2013] Gaz Pal, 13 August, 7: 'an obstacle of fact, like insolvency'; and, similarly, CA Nîmes, 13 September 2012 (n 4). In scholarship, Antoine Gouëzel's research demonstrates the trend. He says that 'reference to obstacles of fact is misleading, an examination of *la jurisprudence* revealing that it always amounts in reality to the insolvency of the debtor'; five sources are cited in support of this, and only one against: *La subsidiarité en droit privé* (Economica 2013) no 119 and note 6; and see, too, Terré et al and Chénédé (n 33) no 1312 note 2. For later recognition that other factual impediments might prevent recourse against a primary debtor, like non-identification, see A Posez, 'La subsidiarité de l'enrichissement sans cause: étude de droit français à la lumière du droit comparé' (2014) 91 Rev dr int et comp 185, 226. For his thoughtful approach, Posez does not endorse the law-fact model. Carla Habre also leaves open the possibility of other obstacles of fact, but gives no examples: *La subsidiarité en droit privé* (LGDJ 2015) no 81.

II. ANALYSIS OF THE CLAIM

In this second part of the chapter, the claim set out above is analysed. The framework for discussion is the principles of subsidiarity developed in chapter 2 of this study. The background is the conditional nature of subsidiarity, also developed in chapter 2, the law of unjust enrichment, and the general question of its subsidiarity, both surveyed in chapters 1 and 3.

A. Existence

Once in place as an operative rule or principle, subsidiarity is not concerned to determine whether a given entity to which it applies actually exists. To be a rule of subsidiarity, it would seem necessary for a rule to create, maintain, or put an end to, a relationship of subsidiarity between entities. For a rule to destroy one or more of the entities, the interaction of which it is supposed to manage, might be thought to prevent it from carrying out these functions in relation to that entity. It would also seem to deal with a question of overlap in a less than conditional manner. And as argued in chapter 2, subsidiarity is an inherently *conditional* idea. Once an entity does not exist, there is no way for it eventually to become competent. Here, the relevant entities are, on one side, any practically useless action(s), and on the other, the *action en enrichissement injustifié*. Our five propositions do not satisfy the instant principle.

It might be thought that the claim escapes criticism under this head because, *ex hypothesi*, the obstacle of fact permission does not make an action in unjustified enrichment disappear, as the rules about other open actions and actions barred by obstacles of law do (in which cases, according to the *Code civil*, art 1303-3, the claimant ‘has no action’).³⁵ However, the obstacle of fact rule *preserves* the existence of the *action en enrichissement injustifié*. In this sense, it *does* determine whether, on a given set of facts, there is any unjustified enrichment which might potentially be subsidiary. Rules of subsidiarity *assume* the existence of the entities to which they apply. The rule which this chapter addresses does not.

³⁵ The partial exception to the obstacle of law bar, for *negotiorum gestio* in the *Code civil* art 1303-5, makes no difference to the basic principle here. This issue will be discussed in more detail in chapter 10.

B. Plurality

A relationship of subsidiarity positively requires the existence of at least two entities, or groups of entities. Without a plurality of entities, no relationship would be possible at all in a given context, and whatever authority existed in that context would lie unconditionally with the only relevantly extant entity. Our five propositions cannot be criticised here.

This second principle of subsidiarity is satisfied where the obstacle of fact problem arises. This is because, first, the *action en enrichissement injustifié* will be open – that is, exist – on any relevant facts. Secondly, any other action will remain *legally* open, also, even though *practically* useless, as distinguished commentators have reminded us.³⁶ When an enrichment claimant invokes *enrichissement injustifié* due to an obstacle of fact, therefore, there will indeed exist a plurality of entities – of actions – which could potentially be in a relationship of subsidiarity.

C. Overlap

For a rule of subsidiarity to be relevant in any context, at least two entities in that context must be capable of overlapping if unrestrained. Otherwise, there would be nothing for a conditional rule of subsidiarity to do. Our five propositions satisfy this principle.

The claim is simply caught by this part of our theory of subsidiarity. The obstacle of fact permission is not concerned with any potential initial overlap, ie, before its own application, between the *action en enrichissement injustifié* and any other action, practically useless or not.

³⁶ L Andreu and N Thomassin, *Cours de droit des obligations* (3rd edn, Gualino/Lextenso 2018) no 1755 (original emphasis): ‘l’action est *juridiquement* « ouverte » mais *pratiquement* « fermée »’.

D. Meta-authority

For a rule of subsidiarity definitively to resolve questions of allocation and overlap, it must bind the relevant entities by constituting an independent, higher authority in relation to them. If this were not so, and the relevant entities could manage their relations without an independent, higher, organising rule (as, for example, would be the case if one of them were sovereign and could dictate any relevant interactions), there would be no need for subsidiarity. This is subsidiarity as meta-authority. A rule of subsidiarity is what dictates whether the entities to which it applies have competence or authority, however they might behave if unrestrained. And the condition, howsoever framed, on which allocation takes place, goes to the general essence of subsidiarity. Our five propositions do not satisfy the instant principle.

The rule which concerns us, tucked behind article 1303-3 of the *Code civil*, living on in *jurisprudence* and *doctrine*, is not a meta-authority in relation to the *action en enrichissement injustifié*, or any other practically useless action. It finds expression in the chapter of the *Code* on the enrichment action, of which it is an ‘inherent condition’.³⁷ So the rule enjoys no source independent of that action. It does not govern other useless actions which might be relevant, either. It merely preserves unjustified enrichment, and allows it to compete with other actions. These decide for themselves, so to speak, what they are, or are not, going to do, and nothing in our rule change that. Rules which are not independent, and cannot actually govern the things to which they apply, are not rules of subsidiarity.

E. Not sovereignty

For a relationship of subsidiarity to exist, no entity said to be part of that relationship can be sovereign over any other entity in that relationship. In such a situation, there would be nothing for subsidiarity to do, because authority in that context would be

³⁷ See Civ 1re, 4 April 2006, pourvoi n° 03-13986, *Bull civ I*, n° 194; [2006] RLDC, n° 28, 11, observations by S Doireau: ‘le caractère subsidiaire reconnu à l’action fondée sur le principe de l’enrichissement sans cause ne constitue pas une fin de non recevoir au sens de l’article 122 du nouveau Code de procédure civile mais une condition inhérente à l’action’; CA Rennes, 18 December 2007, RG n° 06/00867; CA Nîmes, 8 January 2008, RG n° 04/01413; CA Basse-Terre, 5 January 2009, RG n° 05/01889; CA Douai, 26 October 2009, RG n° 08/06633; CA Limoges, 4 March 2013, RG n° 12/00560; CA Metz, 21 September 2017, RG n° 17/00339.

allocated *unconditionally*. This goes against the essence of subsidiarity. Our five propositions do not infringe this principle.

When the rule addressed in this chapter applies, the claimant has a free choice between the *action en enrichissement injustifié* and any other practically useless action. The rule does nothing to prevent the witless claimant from making a bad choice. In situations covered by our claim, no action is sovereign over any other.

F. Not concurrence

An extant relationship of subsidiarity is incompatible with the free concurrence of the entities said to be part of that relationship. Conditionality would be absent in such a situation, since competence would not be ordered in any way at all. The whole point of subsidiarity is to prevent concurrence which is happening, or might happen, as argued in chapter 2. Our five propositions do not satisfy this principle.

There can be no subsidiarity when the entities supposedly in such a relationship can freely concur. That is the antithesis of subsidiarity. But it is precisely what is allowed to happen when the obstacle of fact rule applies. If they know what is good for them, claimants *should* not use the practically useless action. But they *can*. Rules of subsidiarity build relationships which prevent this.

III. RE-ANALYSIS OF THE CLAIM

This part of the chapter attempts to replace the subsidiarity-based explanation of the obstacle of fact permission with something else. After a summary, the basic argument is applied to some of the material collected in the first part of this chapter.

A. The argument in five stages

First, the obstacle of fact permission derogates on two levels from the subsidiarity rules in the *Code civil*, art 1303-3, which bar the *action en enrichissement injustifié* where the claimant (i) *has* a useable, open, non-enrichment action, or (ii) *had* a non-enrichment action which is now legally barred. On one level, it derogates from the

open action rule: an open action does not necessarily bar *enrichissement injustifié*. On another level, it derogates from the barred action rule: where the obstacle is factual, not legal, *enrichissement injustifié* remains competent.

Secondly, previous chapters dispatched the rules in 1303-3 from which the obstacle of fact permission derogates, in the statutory, proprietary, contractual, and tortious/delictual settings. They cannot be about subsidiarity. So a derogation from them on the basis of subsidiarity does not assist.

Thirdly, as seen in part II of this chapter, *the obstacle of fact permission cannot be about subsidiarity, either*. So it is unsatisfactory, both as a derogatory rule, and on its own terms.

The next two points inform the analysis conducted in the rest of this part of the chapter.

The fourth stage of the argument is to remember that the practical uselessness of relief against one person bears not on the (in)justice, either of *that* person's enrichment, or the enrichment of *another* person. Whenever the obstacle of fact permission applies, any enrichment coveted by the claimant *must still be unjustified*. Suppose A confers a single benefit, directly on B, and, indirectly, on C. Either C's enrichment is unjustified, and A may be able claim in unjustified enrichment against C; or it is not. If it is justified, then there is no unjustified enrichment on the facts, and nothing to claim, or complain, about.

The fifth stage of the argument is to consider an explanation of the material in this chapter to replace subsidiarity. The better question to ask may be framed around policy: does a legal system stultify itself in allowing unjustified enrichment to be used as an alternative route to redress – the phrase 'as a form of insurance' is too loaded – if relief from a third party is in fact use/less (as where that party is insolvent), or, in a two party case, in order later to strike at a defendant once relief against it is in fact use/ful (as upon its return to financial stability)?³⁸ The proposition for development, then, is that French law appears to have answered this question positively.

³⁸ For this latter scenario, see Civ 1re, 3 May 2007 (n 19).

B. Development of the argument

The above proposition can now be investigated. This will be done by focusing on the situations in which French courts have confronted the obstacle of fact permission: in contract cases – the *Boudier/Gorge*-type scenario; in statutory obligation cases – like the *Case of the False Father*; and in two-party situations – like the *Case of the Kindly Aunt*.

Before this, however, we remind ourselves of the fourth stage of our argument: whenever the obstacle of fact permission applies, any enrichment coveted by the claimant *must still be unjustified*.³⁹ This is now established by the *Code civil*: article 1303-3 operates on the footing that it is additional to the content of article 1303 and following ('[t]he impoverished person has no action on this basis' [ie, in unjustified enrichment] where...). If the basis of the action is not established, the obstacle of fact permission gets one nowhere.

Contract cases⁴⁰

If they have thought about it in such terms, French courts have answered positively the policy question in contract cases to which the obstacle of fact permission applies. Here, we focus on *Boudier*,⁴¹ and the *Gorge* case.

We first ask whether the enrichments in *Boudier* and *Gorge* were justified. As to the landowner's enrichment in the former, it seems not to have been. The enrichment claimant – the fertiliser merchant – had a contract with a third party – the tenant. In turn, the tenant had an obligation to the landowner – though we do not know precisely

³⁹ Esmein, *Traité pratique* (n 32) no 763. One critic in principle of the obstacle of fact permission seems, with respect, to ignore this: CP Filios, *L'enrichissement sans cause en droit privé français* (Bruylant 1999) no 410.

⁴⁰ For the Anglo-Australian rule against 'leapfrogging' contractual counterparties, see *MacDonald Dickens & Macklin (a firm) v Costello* [2011] EWCA Civ 930, [2012] QB 244 [21]-[32] (Etherton LJ, with whom Patten and Pill LJ agreed); *Lumbers v W Cook Builders Pty Ltd (in liq)* [2008] HCA 27, (2008) 232 CLR 635 [43]-[55] (Gleeson CJ), [79]-[80], [125]-[126] (Gummow, Hayne, Crennan and Kiefel JJ). For Scots law, see N Whitty, 'Indirect Enrichment in Scots Law, I and II' [1994] JR 200 and 239. More generally, see HLE Verhagen, 'The Policies against Leapfrogging in Unjust Enrichment: A Critical Assessment' (2018) 22 Edinburgh L Rev 55.

⁴¹ Some do not take Labbé's word about insolvency: Flour, Aubert and Savaux (n 32) no 55(c) note 1. Compare Malaurie, Aynès and Stoffel-Munck (n 32) no 1071(2).

how it was framed – to make the land fertile. As the *Code civil*, article 1303-1, now provides, '[a]n enrichment is unjustified where it stems neither from the fulfilment of an obligation by the person impoverished nor from his intention to confer a gratuitous benefit'. However, Labbé's note assists: the termination account indicated a right to the benefit of the harvest *minus* the value of the fertiliser. There was no *cause légitime* for the landowner's receipt of that latter benefit. As Labbé also reported, the court knew that the tenant farmer was insolvent.

It seems that the housing company's enrichment in the *Gorge* case was unjustified, too. The entire basis of the contract between it and the builder, Gorge, was that the company would never benefit from the works. In the judgment, Bourse is referred to as the 'beneficiary' of the works. This must mean the *intended* beneficiary, since it was the company which actually benefitted from them on the facts (after the rescinded sale), and Bourse was obliged to pay for them under the construction contract between the company and Gorge. So even though Gorge performed according to a contractual obligation to the company, the contract provided no legal ground for the housing company's enrichment. This appears consonant, *a contrario*, with the view, put forward more fully in chapter 4, that legal grounds need not confer upon a party enriched any entitlement to the enrichment: we do not need a contractual provision to clarify the objective basis on which the transfer of benefits occurred. Just as the footing on which a contract is concluded can point in favour of an enrichment's being justified, in the *Gorge* case, it pointed against it.⁴²

We can now examine French responses to the policy question in more detail. Unsurprisingly, commentary is most extensive in contract cases. Analysis tends to be found in the older books, perhaps because now, the rule to which the question relates is so settled. For François Goré, there is no question that the obstacle of fact permission grants an improper priority to the enrichment claimant whose contractual

⁴² For another aborted sale case, like *Gorge*, see Civ 1re, 14 January 2003 (n 13). Compare Civ 3e, 11 June 1985; [1986] D 456, noted by P Dubois, in which a contractor's enrichment at a subcontractor's expense was clearly justified by the former's contract with the employer. It should be noted that there is a special and regularly updated regime for all subcontracting (*la sous-traitance*): Loi n° 75-1334 of 31 December 1975 relative à la sous-traitance. For the failure of an unjustified enrichment action after non-compliance with the statute, see, eg, Civ 3e, 4 December 2002, pourvoi n° 01-03907, *Bull civ* III, n° 247; [2003] Defrénois 1271, observations by H Perinet-Marquet.

counterparty is insolvent. This is precisely not what is being granted,⁴³ when the claimant succeeds in unjustified enrichment against the third party.⁴⁴

‘It is, purely and simply, the application of the general principles of unjustified enrichment. The party impoverished no longer comes forward as a contractual creditor, but as an extra-contractual one. [...] In such a case, the claimant will perhaps be able to sue directly the debtor of [its primary] debtor. [...] The action [in unjustified enrichment] will permit the avoidance of competition with the other creditors of the contractual debtor, even though this is not its essential goal.’

The question whether the claimant might have taken the risk of its contractual counterparty’s insolvency does not feature in Goré’s account. This is because impoverishment at one’s own risk is considered separately in French unjustified enrichment. The *Code civil*, article 1303-2, provides that ‘[t]here is no restitution where the impoverishment stems from an act done by the impoverished person with a view to his personal benefit’. Such behaviour is a justification for any enrichment of the defendant.⁴⁵ As a *jurisprudence constante* has held: the *action de in rem verso* ‘cannot apply when [the claimant] has acted in its own interest and at its own risk’,⁴⁶ or ‘of its own initiative and at its own risk’.⁴⁷ It appears that the rule has not been applied to

⁴³ Though he does not see this as a bad thing, Jean-Pierre Béguet disagreed, viewing the mitigation of the consequences of others’ insolvency as the principal spur to unjustified enrichment’s development (*‘l’idée générale motrice’*), and affirming the *action de in rem verso*’s potential to subvert priority rules: *L’enrichissement sans cause* (Tepac 1945) nos 43-51, 164, 166-167.

⁴⁴ F Goré, *L’enrichissement aux dépens d’autrui* (Dalloz 1949) 184: ‘Ce sont les principes généraux de l’enrichissement injuste qui sont purement et simplement appliqués. L’appauvri ne se présente plus comme créancier contractuel, mais comme créancier extracontractuel. L’action [en enrichissement injuste] permettra d’éviter le concours entre les autres créanciers du débiteur contractuel, bien que son but essentiel ne soit pas d’éviter ce concours.’

⁴⁵ In favour: Marty and Raynaud (n 32) no 397; Starck, Roland and Boyer (n 32) no 2202; Flour, Aubert and Savaux (n 32) no 50. Seeing self-interest as a *sui generis* condition of the enrichment action: Chabas (n 32) no 701.

⁴⁶ Civ, 28 March 1939; [1939] S, I, 265, noted by L Audiat; [1942] DC 119, noted by FG; Civ 3e, 2 December 1975, pourvoi n° 74-13104, *Bull civ* III, n° 351; Civ 1re, 19 October 1976, pourvoi n° 75-12419, *Bull civ* I, n° 300: self-interested extension of electricity cables justified the enrichment of another landowner branching off from the extension. See also Civ 2e, 3 March 2016, pourvoi n° 15-14067; [2016] *Bull Joly soc* 337, observations by H Lécuyer; [2016] *Gaz Pal*, 6 September, 67, observations by B Dondero: self-interested extra work for a business by a person with a 49% stake justified the enrichment of the business by that extra work, necessary when the business partner could not work after a car accident.

⁴⁷ Civ 3e, 20 May 2009, pourvoi n° 08-10910, *Bull civ* III, n° 116.

exclude the *action de in rem verso* where a party enriched is sued upon its return to liquidity, or because another person became insolvent.

The question whether contracting with a person who later becomes insolvent constitutes negligence or other blameworthy conduct barely features in Goré's account, beyond a passing acceptance that this might be relevant to obstacles of fact.⁴⁸ Again, this is understandable. Fault by the claimant is a separate question, on which a short diversion is necessary before addressing fault by the claimant and obstacles of fact. The *Code civil*, article 1303-2, provides that '[t]he court may reduce the quantum of a restitutionary award if the impoverishment stems from the fault of the person impoverished'. Reduction includes reduction to nothing, according to the French Ministry of Justice's report on the reform of the *Code civil*,⁴⁹ and academic opinion.⁵⁰ There are many cases on the matter. So, it is well established that deliberate fault,⁵¹ or *dol* (bad faith or fraud),⁵² will deprive claimants of unjustified enrichment actions.⁵³

⁴⁸ When criticising Rouast's view that fault is relevant to the obstacle of law bar, and that author's later analysis of the *arrêt Marty*, Civ, 12 February 1923; [1924] D, I, 129, noted by A Rouast, as one in which the claimant's fault led to the loss of his enrichment action due to an obstacle of law. Goré appears to disagree with this, and sees it as a case in which the claimant negligently allowed himself to be affected by an obstacle of fact in failing to comply with statutory formalities for a privilege in insolvency. See A Rouast [1924] D, I, 129, 131 (second column); Goré (n 44) 170, 178-179. A later case suggests that Rouast's view prevails: CA Aix-en-Provence, 21 November 2017 (n 3).

⁴⁹ Ministère de la justice, 'Rapport au Président de la République relatif à l'ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations' [2016] JORF n° 0035, 11 February 2016, text n° 25 <<https://www.legifrance.gouv.fr/eli/rapport/2016/2/11/JUSC1522466P/jo/texte>>: 'the award of persons whose impoverishment results from a *faute* can be reduced, [or] even reduced to nothing'. On the authority of the report, as equivalent to academic work, see P Puig, 'L'autorité des rapports relatifs aux ordonnances' [2017] RTD Civ 84.

⁵⁰ G Chantepie and M Latina, *La réforme du droit des obligations – Commentaire théorique et pratique dans l'ordre du Code civil* (2nd edn, Dalloz 2018) no 752.

⁵¹ *Le an intentional act with intended consequences* ('la volonté de commettre le dommage tel qu'il est survenu'): Civ 2e, 1 July 2010 (two *arrêts*), pourvois n°s 09-10590, 09-14884, *Bull civ* II, n°s 129, 131; [2010] Resp civ et assur n° 10, October, comm 263, observations by H Groutel; [2011] D 355, noted by Y Avril.

⁵² '[L]a faute dolosive exige de la part de son auteur des agissements frauduleux': Civ 1re, 6 December 1977, pourvoi n° 76-12855, *Bull civ* I, n° 460; Civ 3e, 20 December 1978, pourvoi n° 77-13377, *Bull civ* III, n° 375.

⁵³ Soc, 3 July 1990, pourvoi n° 88-18723, *Bull civ* V, n° 337: intentional fault; Com, 19 May 1998, pourvois n°s 96-16393, 96-17136, *Bull civ* IV, n° 160; [1999] D 406, noted by M Ribeyrol Subrenat; [1999] RTD Civ 106, observations by J Mestre; [1999] JCP G, II, 10194, A Karm: *dol*. Naturally, criminal fault will also justify the enrichment of a defendant to an enrichment action. See Civ 1re, 18 January 1989, pourvoi n° 87-16938, *Bull civ* I, n° 21: no action for tax paid and work done on property obtained by the presentation of a false will.

*Example.*⁵⁴ Jane takes her television to Shop to see about having it repaired. She specifically asks for a quote before any repairs. Shop repairs the television without contacting Jane. Since there is no contract between the parties, Shop sues Jane in unjustified enrichment. It fails, because it deliberately disregarded Jane's wishes.

On the effect of other kinds of fault, different chambers of the *Cour de cassation* diverge. The *Chambre Commerciale* has denied actions for simple fault,⁵⁵ that is, negligence or carelessness without an intention to harm.⁵⁶ But the *Première*, *deuxième*, and *troisième chambres civiles* insist that at least serious fault – *faute lourde* – loosely translated as gross negligence,⁵⁷ is necessary to do this:⁵⁸

‘Though having behaved imprudently or negligently will not deprive a person who, in impoverishing itself, has enriched another, of its recourse founded upon unjustified enrichment, the *action de in rem verso* cannot be

⁵⁴ This example is based on Civ 1re, 15 December 1998, pourvoi n° 96-20625, *Bull civ I*, n° 363; [1999] D 425, observations by J-C Saint-Pau; [1999] Defrénois 377, observations by J-L Aubert; [1999] RTD Civ 400, observations by J Mestre.

⁵⁵ See, respectively, Com, 18 May 1999, pourvoi n° 95-19455, *Bull civ IV*, n° 104; [1999] JCP E 1127, observations by P Morvan; [2000] D 609, observations by J Djoudi: straightforward mistaken payment; Com, 14 October 2014, pourvoi n° 13-22894: money paid out on wrong account. The latter case returned to the *Cour de cassation* as Com, 21 March 2018, pourvoi n° 16-18202. The argument that negligence would not bar the action was again rejected.

⁵⁶ Civ 2e, 2 April 1997, pourvoi n° 95-14687, *Bull civ II*, n° 113; [1997] D 411, noted by B Edelman.

⁵⁷ Characterised by extreme negligence bordering on fraud or bad faith (*la négligence d'une extrême gravité confinant au dol*): Com, 1 April 2014, pourvoi n° 12-15939, *Bull civ IV*, n° 62; [2014] RTD Com 393, observations by B Bouloc; Civ 1re, 29 October 2014, pourvoi n° 13-21980, *Bull civ I*, n° 180; [2015] D 188, noted by V Mazeaud; [2015] RDC 246, observations by O Deshayes. Evaluation of *faute lourde* is subjective: Com, 29 June 2010, pourvoi n° 09-11841, *Bull civ IV*, n° 115; [2010] RDC 1220, observations by Y-M Laithier; [2010] RDC 1253, observations by O Deshayes; [2010] RTD Civ 555, observations by B Fages.

⁵⁸ Civ 1re, 5 April 2018, pourvoi n° 17-12595, *Bull civ I*, forthcoming; [2018] RTD Com 353, observations by F Pollaud-Dulian; [2018] Gaz Pal, 15 May, 36, observations by C Berlaud: ‘si le fait d’avoir commis une imprudence ou une négligence ne prive pas de son recours fondé sur l’enrichissement sans cause celui qui, en s’appauvrissant, a enrichi autrui, l’action *de in rem verso* ne peut aboutir lorsque l’appauvrissement est dû à la faute lourde ou intentionnelle de l’appauvri [...]’. Civ 1re, 13 July 2004, pourvoi n° 01-03608, *Bull civ I*, n° 208; [2005] RTD Civ 120, observations by J Mestre and B Fages: rejet, claimant succeeded as negligence acceptable; Civ 1re, 27 November 2008, pourvoi n° 07-18875, *Bull civ I*, n° 272; [2009] RTD Civ 113, observations by B Fages; [2009] D 1122, noted by Y Dagorne-Labbe: cassation, claimant should have succeeded as only negligence on the facts; Civ 1re, 19 March 2015, pourvoi n° 14-10075, *Bull civ I*, n° 66; [2015] D 1084, observations by J Lasserre Capdeville; [2015] Gaz Pal, 2 July, 13, observations by M Mekki; [2015] JCP E 1238, noted by S Le Gac-Pech; [2016] RLDC n° 134, 8, observations by M Tchendjou; Civ 2e, 2 December 1998, pourvoi n° 96-22524, *Bull civ II*, n° 289; [1999] RTD Civ 105, observations by J Mestre: rejet, claimant succeeded as negligence acceptable; Civ 3e, 31 May 2006, pourvoi n° 05-18214, *Bull civ III*, n° 137: rejet, claimant succeeded as negligence acceptable.

brought when the impoverishment is due to the serious or intentional fault of the party impoverished [...].’

*Example.*⁵⁹ Developer arranges for a property purchase in its favour to be financed in part by a cheque from Bank. Bank omits to conclude any contract of loan or other recognition of debt between the parties but issues and negligently honours the requested cheque. Realising its mistake, Bank sues Developer in unjustified enrichment and succeeds, despite failing to take an ‘elementary precaution’ in line with ‘normal banking procedures’.

The difference of opinion might be explained by a more rigorous approach in business contexts, with which the *Chambre commerciale* is generally concerned.⁶⁰ In any case, it appears that the new codification can reconcile the jurisprudential divergences, and suggests legislative approval of the idea that some simple faults will merit judicial sanction through a reduction in the claimant’s award.⁶¹ The more serious the claimant’s fault, the ‘less unjust’ the defendant’s enrichment. Deliberate fault or *dol* should entirely justify it: such conduct can be interpreted as evincing either an intention gratuitously to enrich (donative intent, or *une intention libérale*),⁶² or risk-taking (addressed above). But, lacking intention, negligence and *faute lourde* cannot be so analysed. To understand fault by the claimant as a whole in unjustified enrichment, it is perhaps necessary to accept, with some French writers, that the courts, and now, the legislator, have moralised the institution of unjustified enrichment due to instrumentalist concerns.⁶³

⁵⁹ This example is based on Civ 1re, 11 March 1997, pourvoi n° 94-17621, *Bull civ I*, n° 88; [1997] D 407, observations by M Billiau.

⁶⁰ J-L Aubert ‘Quelques remarques sur la faute de l’appauvri dans l’enrichissement sans cause’ in F Chabas and others (eds), *Etudes offertes à Jacques Dupichot: Liber amicorum* (Bruylant 2004) no 13.

⁶¹ F Chénéde, ‘Les «quasi-contrats»’ [2015] JCP G, supplement to n° 21, May, 60, no 16: ‘Cette disposition viendra opportunément mettre fin aux incertitudes et divergences jurisprudentielles actuelles en consacrant une solution d’ailleurs susceptible de concilier les positions contraires : le juge pourra diminuer – sans doute jusqu’à la supprimer – l’indemnité due à l’appauvri en tenant compte de la gravité de sa faute.’

⁶² As to which, see *Code civil*, art 1303-1: ‘An enrichment is unjustified where it stems neither from the fulfilment of an obligation by the person impoverished nor from his intention to confer a gratuitous benefit’. Whether there is *intention libérale* will depend on the facts of the case. Compare the differing results in Civ 1re, 24 September 2008 (two *arrêts*), pourvois n°s 06-11294, 07-11928, *Bull civ I*, n°s 211-212 [2008] AJ Famille, 431, noted by F Chénéde; [2008] RTD Civ 660, observations by J Hauser; [2009] Defrénois 545, observations by J Massip; [2009] Defrénois 2516, observations by E Savaux.

⁶³ For this view in specific studies, see M Lecène-Marénaud, ‘Le rôle de la faute dans les quasi contrats’ [1994] RTD Civ 515 nos 7-11; J Beauchard, ‘Etudes sur l’enrichissement sans cause: la faute de l’appauvri’ in V Mannio and C Ophèle (eds), *L’enrichissement sans cause – la classification des sources*

What, then, of fault and obstacles of fact in unjustified enrichment? In a 1939 case, the claimant repaired premises under a contract with their occupier, who became insolvent and did not pay. Unknown to the claimant, the occupier was a mere lessee. So the premises could not be judicially sold to cover the repairs. The *Chambre des requêtes* approved two grounds on which the court below had rejected claimant's action in unjustified enrichment against the lessor. The first was that his contract with the lessee entitled the lessor to the benefit of the repairs. The second was the claimant's serious fault – '*le juge du fond [...] déclare qu'elle [la société demandeuse] a commis une grave négligence*' – in not establishing the status of its contractual counterparty, 'especially given how valuable the contract was'. This could have been done by consulting an official register. In the result, the claimant's impoverishment was 'the consequence of the insolvency of the person with whom' it had 'dealt, and derive[d] from its own imprudence'.⁶⁴ In this instance, then, an unjustified enrichment action in the face of an obstacle of fact – insolvency – would have made a mockery of what might reasonably be thought to have been policy objectives of the official register: certainty in commercial dealings, and the careful arrangement by businesspeople of their affairs. The claimant's failure to do the latter was, through French eyes, serious indeed, and justly sanctioned.

To sum up, *Gorge* suggests a positive *general* answer to the policy question in contract cases.⁶⁵ Even for those reasoning in terms of subsidiarity, this is understandable: the *action de in rem verso* is not, in such a case, 'an underhanded way of obtaining what

des obligations (LGDJ 2007) 78-80; and, though arguing for a different approach to that taken in the cases based on risk-taking, rather than the kind of fault, S Moisdon-Chataigner, 'La nouvelle appréciation du comportement fautif de l'appauvri dans l'enrichissement sans cause' [2005] RRJ 1291, nos 22-23, 28, 46. In mainstream textbooks, see, eg, Flour, Aubert and Savaux (n 32) no 51; Terré, Simler and Lequette (n 32) nos 1069, 1071; not reflected in Terré et al and Chénédé (n 33) no 1318. For a useful survey of older cases and commentary, see Marty and Raynaud (n 32) no 397. For comparative perspective, see C Kenefick, 'La faute de l'appauvri: comparaisons anglo-françaises sur l'enrichissement injustifié' [2015] RDC 961.

⁶⁴ Req, 22 February 1939; [1940] DP, I, 5, noted by G Ripert (second case): 'Attendu, d'autre part, que le juge du fond [...] constate qu'il était loisible à cette société, par la consultation du registre du commerce, de connaître la véritable situation de Fourraut, et déclare qu'elle a commis une grave négligence en ne se renseignant pas, surtout à l'occasion d'un marché si important, sur la qualité de son cocontractant; qu'il suit de là que l'appauvrissement de la Société Lartaut et Pol est la conséquence de l'insolvabilité de celui avec qui elle a traité et dérive de sa propre imprudence [...].'

⁶⁵ Despite early opposition by Bartin (n 27) no 574 note 10. Though his remark is brief, it would appear that his view was predicated on the assumption that any relevant contract would always justify any enrichment.

cannot be [got at] by the normal route, because, *ex hypothesi*, the contractual action is [in fact] open'.⁶⁶ It is suggested that the courts will not sanction a claimant who comes up against an obstacle of fact, simply because protection against, say, insolvency, *could* have been obtained. That approach has been rejected.⁶⁷ But sometimes, as with the scenario before the court in the 1939 case, failure to prevent mishap may be so bad that an example must be made.

Statutory obligation cases

The *Case of the False Father* responds positively to the policy question in statutory obligation cases to which the obstacle of fact permission applies. There is no detailed discussion on this point, as there is in relation to the contract cases. It can be considered more briefly.

Was the second husband's enrichment in the *False Father's Case* justified? Clearly not. The statutory basis on which the false father contributed to the little girl's upkeep fell away once his true status was established: he had, in effect, been subsidising the second husband.

Can there be a stultification-based objection to the pursuit of the second husband when the mother was insolvent? Seemingly not. Both true parents were obliged to maintain the child. Neither's duty was more important than the other's. Since one could not pay the false father, there was no reason why the other should not step in. This symmetry makes the case particularly clear; there will naturally be other less compelling scenarios in which claimants still succeed,⁶⁸ or in which the relevant obstacle of fact is not insolvency.⁶⁹

⁶⁶ Esmein, *Traité pratique* (n 32) no 763(2).

⁶⁷ Cour de Lyon, 27 June 1934; [1934] S, II, 219: 'Attendu, en tout cas, que la simple possibilité qu'aurait eue Peylet d'acquiescer une autre action, s'il avait eu la diligence d'exécuter certains actes à cette fin, ne suffit pas à exclure l'action *de in rem verso*; Attendu que si l'on en décidait autrement il faudrait la refuser également contre le tiers enrichi à celui qui, par son simple manque de diligence à poursuivre son débiteur contractuel, a laissé l'insolvabilité de celui-ci se produire [...].'

⁶⁸ See, eg, Civ 1re, 16 February 1954, *Bull civ I*, n° 60, in which A had a statutory action against B. B was insolvent, so A successfully sued C in unjustified enrichment instead.

⁶⁹ See, eg, CA Nîmes, 13 September 2012 (n 4), discussed above.

Two-party cases

The *Case of the Kindly Aunt* answers the policy question positively in two-party cases to which the obstacle of fact permission applies. Again, there is no in-depth material, but the questions can still be considered.

First, Mr X's enrichment appears to have been unjustified. During the time for which he should have been maintaining his daughter, Ms Y did it for him without obligation or donative intent.

What of policy? If anything, the indirect enforcement of X's obligation to maintain his child via unjustified enrichment promotes legal coherence here. The solution does not concern.

CONCLUSION

This chapter has addressed the obstacle of fact limb of the *action en enrichissement injustifié*'s supposed subsidiarity in French law and scholarship.

The claim drawn from the available material is incorrect. First, it involves a rule which does not presuppose the existence of the entities to which it applies. Rules of subsidiarity do the opposite. Secondly, the rule is not relevantly a meta-authority, whereas a rule of subsidiarity must be. And thirdly, the rule provides for free concurrence between the *action en enrichissement injustifié* and any practically useless action. This state of affairs is the antithesis of subsidiarity.

After establishing that the obstacle of fact permission cannot be about subsidiarity, this chapter moved to suggest an alternative explanation. It was suggested that all of the cases supposedly applying the obstacle of fact permission in the claimant's favour, are simply straightforward cases of unjustified enrichment, in which there is no objection based on grounds of coherence in the law to the doctrine's operation. In fact, they are quite unremarkable.

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CHAPTER 9

SUBSIDIARITY WITHIN THE LAW OF UNJUST ENRICHMENT

Previous chapters in this study provide background on the law of unjust enrichment, introduce a definition and principles of subsidiarity, and sketch the history of, and reasons for, subsidiarity in the law and scholarship on unjust enrichment. This chapter is the sixth to put those general chapters to use. It addresses arguments in the law and literature made about the subsidiarity of one kind of enrichment claim to another. English law discloses no material to evaluate. However, one prominent Scots writer's views on the interaction of that jurisdiction's general principle against unjustified enrichment and the established categories of enrichment liability are addressed. And there is plenty in the French sources on the supposed subsidiarity of the *action de in rem verso* to other kinds of quasi-contractual action. The law and commentary are set out in part one of this chapter. In the second part, they are analysed against the theory of subsidiarity developed in chapter 2 of this study. It will be seen that the material under consideration cannot correctly be characterised as addressing subsidiarity. The third part of this chapter re-analyses the sources, in order better to understand what is happening in each context.

I. THE CLAIMS

This part of the chapter confirms that we need not here concern ourselves with England. It then sets out material containing claims about the supposed subsidiarity of France's *action de in rem verso* to *negotiorum gestio* and the *condictio indebiti*, and of Scotland's general enrichment principle to recognised cases of liability in unjustified enrichment.

A. England

English law 'recognises a number of discrete factual situations in which enrichment is treated as vitiated by some unjust factor'.¹ However, far from taking an essentialist

¹ *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2018] AC 313 [22] (Lord Sumption, with whom Lord Neuberger, Lord Clarke, and Lord Hodge agreed).

approach, English courts, in common with their Australian and Canadian counterparts, consider that grounds for or (in Canada's case) against restitution may cumulate.² Several commentators support this, also.³ It is not that the language of subsidiarity has not been put to any rule which might interest us here. Rather, no rule of interest exists at all. In the absence of relevant academic argument, England may be left aside here.

B. France

Of interest here is the interaction of the action in *enrichissement injustifié* with the other institutions grouped under the heading of *quasi-contrat*, found in subtitle three of title three of book three of the *Code civil: negotiorum gestio*, governed by articles 1301 to 1301-5, and the *condictio indebiti*, governed by articles 1302 to 1302-3.⁴ Before turning to this, however, two preliminary observations. First, our other two quasi-contractual sources of obligation appear not to be subsidiary. The *Cour de cassation* has held that the *condictio indebiti* 'has no subsidiary character'.⁵ It has also allowed a claimant to proceed in *negotiorum gestio* having failed to prove a contract of mandate, when taking over management left unfinished by a former contractual mandatary.⁶ Such an obstacle (of law) would sink an *action de in rem verso*.

² *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [12]-[18] (Lord Hoffmann), [50]-[51] (Lord Hope), [136]-[142], [154] (Lord Walker), [161] (Lord Brown); *Equuscorp Pty Ltd v Haxton* [2012] HCA 7, (2012) 246 CLR 498 [30] (French CJ, Crennan and Kiefel JJ); *Jedfro Investments (USA) Ltd v Jacyk* [2007] SCC 55, [2007] 3 SCR 679 [34]-[36] (McLachlin CJ, with whom Bastarache, Binnie, LeBel, Deschamps, Charron, and Rothstein JJ agreed).

³ A Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) s 5(3)(a), and commentary, 39-40 (subject to a rule against double recovery); J Edelman and E Bant, *Unjust Enrichment* (2nd edn, Hart 2016) 127; K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (3rd edn, Lexis Nexis 2016) [164]: '[n]eedless to say, more than one unjust factor can co-exist in a particular situation'; M McInnes, 'Revising the Reason for Restitution: Garland Ten Years After' (2015) 57 Can Bus LJ 1, 27-30.

⁴ For brisk, accessible coverage, see R Cabrillac, *Droit des obligations* (13th edn, Dalloz 2018) nos 192-207. We leave aside here other debated, uncoded *quasi-contrats*, such as that based on the illusory representation of a gain, discussed briefly in chapter 7, footnote 34.

⁵ Civ 1re, 19 October 1983, pourvoi n° 82-11383, *Bull civ I*, n° 242; [1985] RTD Civ 169, observations by J Mestre.

⁶ Civ, 20 April 1931; [1931] Gaz Pal, II, 54. For rare academic accord (absent reference to this case), see L Josserand, *Cours de droit civil positif français*, vol II (3rd edn, Sirey 1939) nos 564, 574, 1450: 'the action *negotiorum gestorum* does not have the essentially subsidiary character that *la jurisprudence* has assigned to the *action de in rem verso*'; and at greater length in the now classic study by R Bout, *La gestion d'affaires en droit français contemporain* (LGDJ 1972) no 93. The general lack of treatment by commentators perhaps indicates that this position is considered obvious. Denying *negotiorum gestio* where a contract did exist, compare Com, 16 November 1976, 74-13681, *Bull civ IV*, n° 291.

Secondly, however, academic claims have been made to the effect that the quasi-contractual category *as a whole* is subsidiary – to the rest of the entire legal system, one supposes. One of these claims is unsubstantiated.⁷ A second rests on a suggested extension of the subsidiarity of the *action de in rem verso*,⁸ authority which does not support that extension to *negotiorum gestio*,⁹ and assertion:¹⁰

‘The principle of subsidiarity can [...] be transposed to the other *quasi-contrats* [...]. Its stated goal was to prevent the subversion of the legal system, under the perilous pretext of equity. However, it does not mean that the *quasi-contrats* are inferior in relation to the other sources of law. It [subsidiarity] should be understood as a rule of good sense and coherence, consisting in the constant use of the most relevant and specific legal recourse.’

Against the specific confirmations (above) that the other two codified *quasi-contrats* are not subsidiary, these views are too weakly supported. They may be left aside.

The relationship between *enrichissement injustifié* and *negotiorum gestio* is partly governed by article 1301-5 of the *Code civil*. A very similarly worded provision originally appeared in one of the reform projects leading up to the new codification, the *avant-projet* Catala, at the suggestion of the distinguished commentator, Alain Bénabent.¹¹ He has since remarked on its novelty, and used the language of subsidiarity to describe the situation which it creates.¹² Article 1301-5 states:

⁷ See the two-sentence assertion by M Fabre-Magnan, *Droit des obligations*, vol II (3rd edn, PUF 2013) 418.

⁸ This is the only argument of a third author, favouring a single, unified quasi-contractual action: M Douchy, *La notion de quasi-contrat en droit positif français* (Economica 1997) 267-270.

⁹ The case simply excludes both *enrichissement sans cause* and *negotiorum gestio* in the presence of incompatible statutory provisions: Com, 14 October 1997, pourvoi n° 95-19468, *Bull civ* IV, n° 258; [1997] Dr mar fr 1082, noted by J-P Rémerly and P Bonassies.

¹⁰ P Le Tourneau, ‘Quasi-contrat’, *Rép civ Dalloz* (2018) no 32.

¹¹ G Cornu, ‘Quasi-contrats’ in P Catala (ed), *Avant-projet de réforme du droit des obligations et du droit de la prescription* (Documentation française 2006) 76 and note 1, referring to the project’s article 1329-1.

¹² A Bénabent, *Droit des obligations* (17th edn, LGDJ 2018) no 444: ‘le nouvel article 1303-5 ouvre une voie subsidiaire’.

'If the action of the intervener does not satisfy the conditions for the application of management of another's affairs but nevertheless benefits the principal, the latter must^[13] compensate the intervener according to the rules of unjustified enrichment.'

Two features of this rule stand out. First, it does not displace the first limb of article 1303-3 (set out below) by allowing a free choice between concurrently open actions in *negotiorum gestio* and in *enrichissement injustifié*. This mirrors previous authority, both judicial and academic,¹⁴ and does not constitute a separate claim about subsidiarity to that already made by article 1303-3. Secondly, article 1301-5 creates an exception to the second limb of article 1303-3, which bars *enrichissement injustifié* if another action is barred by an obstacle of law. This is a claim about subsidiarity in French enrichment law. A person may sue and fail in *negotiorum gestio*, then, potentially,¹⁵ win in *enrichissement injustifié*. Previously unrecognised by the courts,¹⁶ this possibility divides academic opinion.¹⁷

A full historical examination of this latter position has not been attempted. But support in older commentary is of interest. Some authors founded their initial recognition of the *action de in rem verso* upon its arising from *gestion d'affaires anormale* – extended

¹³ The 'must' here does not remove the need to satisfy the conditions of unjustified enrichment, as confirmed by the *Code civil*, art 1303. This reminds us that unjustified enrichment applies on its own terms, '[o]utwith the situations of management of another's affairs and undue payment'. A prior reform project substituted 'can' for 'must': F Terré (ed), *Pour une réforme du régime général des obligations* (Dalloz 2013) art 19.

¹⁴ See, specifically, Civ 1re, 16 March 2004, pourvoi n° 01-00186. More generally, see the *arrêts Clayette and Briauhant*, the formulae of which barred the *action de in rem verso* in the presence of any open quasi-contractual action: Civ, 12 May 1914; [1914] D Chron 56; [1914] Pandectes, Bull somm, I, 86; [1918] S, I, 41, noted by E Naquet; Civ, 2 March 1915; [1915] S, Bull somm, I, 20; [1920] DP, I, 102 (first case). For scholarly accord, see A Sériaux, *Droit des obligations* (2nd edn, PUF 1998) 333; AM Romani, 'Enrichissement sans cause', *Rép civ Dalloz* (2017) no 291.

¹⁵ The courts have, on occasion, not used subsidiarity-like reasoning, but found that the conditions of both actions were unsatisfied, as where an action in *negotiorum gestio* failed due to management in the sole interest of the intervener, which self-interest also discounted an *action de in rem verso*: Civ 1re, 5 July 1988, pourvoi n° 86-18218.

¹⁶ See, specifically, Civ 1re, 26 June 1990, pourvoi n° 89-11396. More generally, recall the wide formula pronounced in Civ 3e, 29 April 1971, pourvoi n° 70-10415, *Bull civ* III, n° 277; [1970-1971] Rapport annuel C cass 37; [1971] Gaz Pal, II, 554; [1971] RTD Civ 842, observations by Y Loussouarn. This precluded the *action de in rem verso* where any other action – including, therefore, another quasi-contractual one – was barred by obstacle of law.

¹⁷ In favour: P Esmein (ed), *Aubry & Rau: Cours de droit civil français*, vol IX (6th edn, Libraries Techniques 1953) 333 *in fine*. Against: F Chabas (ed), *Leçons de droit civil de H, L et J Mazeaud*, vol II/1 (9th edn, Montchrestien 1998) no 706 *in principio*.

negotiorum gestio.¹⁸ They essentially based it on the same thing as the latter: an interference with another's affairs. For example, Charles Demolombe declared the *action de in rem verso* to be an 'irregular or incomplete' version of, or an 'auxiliary' to, *negotiorum gestio*, which would lie where the latter's conditions went unsatisfied.¹⁹ The language of subsidiarity was imposed on Demolombe's account in the early twentieth century.²⁰

As to the relationship between *enrichissement injustifié* and the *condictio indebiti*, the starting point is still article 1303-3 of the *Code civil*. As will be recalled from chapter 3, article 1303-3, and the *Cour de cassation*'s formulae from which it derives, are claims or rules about the subsidiarity of the *action de in rem verso* in France. Though they do not themselves use the language of subsidiarity, many *other* sources, referred to earlier, do put it to the now-codified rules. Article 1303-3 provides:

'The impoverished person has no action on this basis [ie, in unjustified enrichment] where another action is open to him or is barred by an obstacle of law, such as prescription.'

There is no rule like article 1301-5 to soften this position. Both open *and* legally barred *condictiones indebiti* preclude the use of an action in unjustified enrichment. This reflects prior authority that an open *condictio indebiti* prevents the operation of an *action de in rem verso*.²¹ On the question whether the latter's use is prevented where the former was barred by an obstacle of law,²² it has not been possible to trace a specific case. A negative answer has perhaps long been considered self-evident, and

¹⁸ For this position in the courts, see, eg, Req, 18 June 1872; [1872] DP, I, 471; Req, 19 December 1877; [1878] S, I, 57; Req, 16 July 1890; [1891] DP, I, 49, noted by M Planiol; [1894] S, I, 19.

¹⁹ C Demolombe, *Cours de code Napoléon*, vol XXXI (4th edn, Lahure 1882) no 49. See also F Laurent, *Principes de droit civil français*, vol XX (Bruylant-Christophe 1876) nos 333-340; L Larombière, *Théorie et pratique des obligations*, vol VII (2nd edn, Pedone-Lauriel 1885) 448-450.

²⁰ See, though disagreeing with Demolombe, CC Stoïcesco, *De l'enrichissement sans cause* (Chevalier-Marescq 1904) 44-45 and note 3. Stoïcesco refers to other authors of the same view, but opines that Demolombe's is the account to alight upon.

²¹ Civ 1re, 5 July 1989, pourvoi n° 87-19984, *Bull civ I*, n° 278; [1990] RTD Civ 282, observations by J Mestre; [1991] D 322, noted by J-L Aubert; CA Nîmes, 16 March 1979; [1979] JCP, IV, 347; CA Montpellier, 18 January 2007, RG n° 05/06026. This position was also endorsed by the *arrêts Clayette* and *Briauhant*, which bar the *action de in rem verso* when quasi-contractual actions are available: Civ, 12 May 1914 (n 14); Civ, 2 March 1915 (n 14).

²² A clear example being the absence of a mistake where a person discharges another's debt: *Code civil*, art 1302-2.

in any event has had firm support since 1971, from the *Troisième chambre civile*'s general formula, barring *actions de in rem verso* where claimants had other actions at their disposal, but which are no longer available due an obstacle of law.²³

C. Scotland

In Scotland, different legal grounds for enrichments, reasons against success in an unjustified enrichment action, may cumulate.²⁴ Of interest in this chapter, however, is a point which has yet to be discussed by the courts: the question whether some kinds of enrichment liability are barred because others are, or were, open to a given pursuer.

One Scots commentator has made a claim relevant to this chapter.²⁵ Robin Evans-Jones has said that Scotland's general principle against unjustified enrichment must:²⁶

'[B]e understood differently according to the different groups of cases to which it is applied. It must also operate at a level subsidiary to the requirements of the established claims like *condictio indebiti*. The reason is that it expresses a single abstract condition of liability (without a legal

²³ Civ 3e, 29 April 1971 (n 16).

²⁴ Applying contract and self-interest, see *Jones v Muir* unreported 10 March 2015 (Sh Ct, Lochmaddy), 2015 GWD 11-183 [6]-[7] (Sheriff Principal Pyle).

²⁵ Two authors did claim that recompense was a 'subsidiary' general action in Scots enrichment law, which would operate only when no other action could: HL MacQueen and WDH Sellar, 'Unjust Enrichment in Scots Law' in EJM Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (2nd edn, Duncker & Humblot 1999) esp 312-314; and, arguing that recompense is subsidiary to negotiorum gestio, HL MacQueen, 'Payment of Another's Debt' in D Johnston and R Zimmermann (eds), *Unjustified enrichment: key issues in comparative perspective* (CUP 2002) 646, 466-467, 475-476, 489. The Scottish Law Commission referred to, but remained neutral on, a similar proposition. It used the language of subsidiarity liberally, asserted that the 'doctrine of subsidiarity' applied such that the *condictio indebiti* must be invoked before recompense. Passing reference was made to the 'similar' result in French law: Scottish Law Commission, *Recovery of Benefits Conferred Under Error of Law*, vol I (Scot Law Com DP no 95, 1993) [3.107]-[3.108]; citing *Varney (Scotland) Ltd v Lanark Burgh Council* 1974 SC 245 (IH); and D Friedmann and N Cohen, 'Payment of Another's Debt' in P Schlechtriem (ed), *International Encyclopedia of Comparative Law*, vol X (Mohr / Siebeck / Nijhoff 1991) [84]. However, Scots law has overtaken these views, and 'it is no longer appropriate to speak of recompense as a ground of action': *MacAdam v Grandison* [2008] CSOH 53 [35] (Lord Hodge). And Professor MacQueen appears to have changed his opinion: 'The Sophistication of Unjustified Enrichment: A Response to Nils Jansen' (2016) 20 Edinburgh L Rev 312, 317: the 'suggestion [...] was not in general accepted by others working in the field. I do not want to return to that argument now [...].'

²⁶ R Evans-Jones, 'Thinking About Some Scots Law: Lord Rodger and Unjustified Enrichment' in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (OUP 2013) 445.

ground) which, in the absence of subsidiarity, would be likely to elide the more numerous concrete conditions of the individual claims.'

The same author's treatise on unjustified enrichment in Scots law provides more detail. Evans-Jones understands the general principle against unjustified enrichment in Scots law to fulfil three functions. Two are the consolidation and explanation of previously recognised enrichment claims, and the provision of a general framework within which the likeness of a potential new instance of enrichment liability may be tested against established claims.²⁷ In relation to a third function of the general enrichment principle, Evans-Jones makes his claim about subsidiarity, which is set out *in extenso*:²⁸

'Level 1. Single Criterion of Liability and General Justiciability

At the most general level, to found a cause of action the defender's enrichment must be "unjustified". At the next level Scots law recognises the general enrichment principle. Here it is the expression of a single criterion of liability to which all causes of action of the law of unjustified enrichment conform. For example, there is a cause of action called *condictio indebiti* which is available when P paid money that was undue in error as to legal liability. Its requirements may also be expressed more succinctly in the terms that D retains P's money "without a legal ground". All the other recognised causes of action like "interference" are equally expressions of the principle at this level. Thus, where D interferes with P's property and is enriched at his expense without right D retains the gain without a legal ground.

In modern legal systems, private law is expressed primarily as a system of rights and not of remedies or actions. In Scots law, therefore, it is not on the remedies of Roman law, or on any other "actional" responses, but on the judicial statements of the general enrichment principle that the law of unjustified enrichment is now generally justiciable. [...]

²⁷ R Evans-Jones, *Unjustified Enrichment, II: Enrichment Acquired in Any Other Manner* (W Green 2013) [3.11]-[3.14].

²⁸ *ibid*, [3.09]-[3.10], [3.37]-[3.39] and notes 39-42.

General Enrichment Principle is Subsidiary to the Requirements of Established Single Causes of Action

The general enrichment principle may be expressive of all causes of action in unjustified enrichment or it may be used more concretely to express in shorthand the cause of action of a single established claim (Level 1). Thus, for example, a *condictio indebiti* may properly be expressed in the terms “retention without a legal ground”. In such a case the general principle is subsidiary to the specific requirements of the recognised claim. What does this mean and why is it necessary?

Comparative: French and Italian Law^[29]

For historical and political reasons, the approach to unjustified enrichment of these two legal systems is very similar.^[30] They both operate a principle of strict subsidiarity of the general enrichment principle. The purpose of the “subsidiarity” rule is to contain the general principle within its appropriate sphere of operation and to ensure that it does not undermine the principles and causes of action of the settled law.

It is perfectly acceptable to use the term “without a legal basis” as a shorthand to indicate that a benefit is recoverable in a particular recognised fact situation. However, as in French and Italian law, the general principle must operate at a subsidiary level to the detailed requirements of any established cause of action.^[31] In determining what is “unjustified” and founds a cause of action, Birks made the point that the law looks downwards to the decided cases and not upwards to an unknowable justice

²⁹ Citing K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir tr, (1996) 3rd edn, OUP 1998) 547ff.

³⁰ Citing P Gallo, ‘Remedies for Unjust Enrichment in the History of Italian Law and in the Codice Civile’ in EJH Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Duncker & Humblot 1995).

³¹ Citing D Visser, ‘The Potential Role of a General Enrichment Action’ (2009) 20 Stellenbosch L Rev 454, 456-458.

in the sky.^[32] If a court approaches the applications of the established law from the perspective of the general principle alone, because it expresses only a single abstract condition (without a legal ground) to found the cause of action, the result can be to elide the more numerous concrete conditions that need to be satisfied to found the established claim. Therefore, if the principle is not treated as subsidiary to the recognised causes of action it will result in decisions that proceed on its single abstract condition. In time this will inevitably undermine the established law and “unjustified enrichment” will have set off in pursuit of a justice in the sky.’

Evans-Jones asks himself what he means by ‘the general principle must operate at a subsidiary level to the detailed requirements of any established cause of action’. With respect, his elaboration is unclear.³³ But examining the principal source to which he refers assists. Therein, Danie Visser favours an approach suggested for South African enrichment law by Schutz JA, in *McCarthy Retail Ltd v Shortdistance Carriers CC*:³⁴ a ‘subsidiary’ general action in unjustified enrichment should be accepted, by which is meant one which operates as a gap-filler, when established actions do not lie. A general action which replaced all pre-existing actions would be ‘an unacceptable erosion of the principle of certainty’.³⁵ Evans-Jones’ preoccupation is clearly the same.

³² Citing P Birks, *An Introduction to the Law of Restitution* (rev ed, Clarendon 1989) 19.

³³ Unfortunately, similarly uncertain is a passage, largely summarising those cited, in R Evans-Jones, ‘Thinking about Principles and Actions: Unjustified Enrichment in Scots and South African Law’ in D Bain and others (eds), *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller* (AUP 2018) 340.

³⁴ 2001 (3) SA 482 (SCA) 487-489 (Olivier and Cameron JJA concurring), arguing for ‘a general action which will fill the gaps’ between and around South Africa’s established enrichment actions, and noting historical support for a general action, ‘at least one of a subsidiary nature’. Like approval of the solution was expressed in D Visser and A Purchase, ‘The General Enrichment Action Cometh’ (2002) 119 S African LJ 260, 266-269; D Visser, ‘Unjustified Enrichment’ [2002] Ann Sur SA Law 367, 368-369.

³⁵ Visser, ‘General Enrichment Action’ (n 31) 456-458. Evans-Jones’ citation of Visser reminds us of the regard in which Scots lawyers hold him. See also, eg, HL MacQueen, ‘The Future of Unjustified Enrichment in Scotland’ [2017] RLR 14, 24 and note 77, describing ‘valiant and valuable work’. Visser’s obvious influence renders appropriate the provision of some background on his thinking about subsidiarity. He did not always use the language: ‘Rethinking Unjustified Enrichment: A Perspective of the Competition between Contractual and Enrichment Remedies’ [1992] Acta Juridica 203. He then started to use it in relation to others’ work: ‘Not the General Enrichment Action’ [1994] TSAR 825, 831; D Visser, ‘Unjustified Enrichment’ in R Zimmermann and D Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (OUP 1996) 551. In the late 1990s, he appears to have accepted the usefulness of the language of subsidiarity in talking about unjustified enrichment’s internal and external relations, and been influenced by subsidiarity abroad, expressing scepticism about ‘formalistic’ French reasoning on protecting ‘the technical structure of the law’, but recognising the difficulty of allowing ‘a completely free choice to the plaintiff’: ‘[p]erhaps the best approach is to allow a choice [between different claims] unless there is a clear policy consideration that necessitates excluding one of the [available] remedies in a particular situation’: D Visser, ‘Unjustified Enrichment’ [1999] Ann Sur SA Law

It seems reasonable to assume that he favours the same rule as Visser, in support of Schutz JA.

II. ANALYSIS OF THE CLAIMS

In this second part of the chapter, the claims set out above are analysed. The framework for discussion is the principles of subsidiarity developed in chapter 2 of this study. The background is the conditional nature of subsidiarity, also developed in chapter 2, the law of unjust enrichment, and the general question of its subsidiarity, both surveyed in chapters 1 and 3.

A. Existence

Once in place as an operative rule or principle, subsidiarity is not concerned to determine whether a given entity to which it applies actually exists. To be a rule of subsidiarity, it would seem necessary for a rule to create, maintain, or put an end to, a relationship of subsidiarity between entities. For a rule to destroy one or more of the entities, the interaction of which it is supposed to manage, might be thought to prevent it from carrying out these functions in relation to that entity. It would also seem to deal with a question of overlap in a less than conditional manner. And as argued in chapter 2, subsidiarity is an inherently *conditional* idea. Once an entity does not exist, there is no way for it eventually to become competent. Here, which entities are relevant depends on the jurisdiction under consideration. In France, they are, on the one side, the action in *enrichissement injustifié*, and on the other, either *negotiorum gestio* or the *condictio indebiti*. In Scotland, they are (according to Evans-Jones), on the one side, the general principle against unjustified enrichment (potentially creative of new instances of enrichment liability), and on the other, all established instances of liability in unjustified enrichment (such as the *condictiones*).

232, 240; discussing the findings of B Nicholas, 'Modern Developments in the French Law of Unjustified Enrichment' in PWL Russell (ed), *Unjustified Enrichment: A Comparative Study of the Law of Restitution* (VUUP 1996); and R Zimmermann and J du Plessis, 'Basic Features of the German Law of Unjustified Enrichment' [1994] RLR 14. Analysis by Visser of these policy considerations is well known, and has been conducted using the language of subsidiarity: see, eg, D Visser and S Miller, 'Between Principle and Policy: Indirect Enrichment in Subcontractor and Garage-Repair Cases' (2000) 117 S African LJ 594, 600, 603, 606, 610, 612. He has also singled out, as a 'main theme' of his treatise, the use of 'the notion of subsidiarity to give appropriate protection to the principle of certainty in the context of a general enrichment action': D Visser, *Unjustified Enrichment* (Juta 2008) 56-59.

As to the action in *enrichissement injustifié* and the unfulfilled (ie, legally barred) action in *negotiorum gestio*, article 1301-5 of the *Code civil* appears to satisfy the instant principle. The exception to the obstacle of law bar does not determine the existence, either of an action based on *negotiorum gestio*, or in *enrichissement injustifié*. Instead, it *presupposes* the non-application – the non-existence on a set of facts – of the former doctrine, in order that a claimant might invoke unjustified enrichment. And it makes no assumption about the existence – ie, satisfaction of the conditions – of any *action de in rem verso* which might eventually be brought.

Article 1303-3 governs relations between, first, the action in *enrichissement injustifié* and the open action *negotiorum gestio*, and, secondly, *enrichissement injustifié* and *condictiones indebiti* (both open and legally barred). As noted in previous chapters, this provision does not satisfy the instant principle. It cannot be a rule of subsidiarity, because it can determine the existence of the action in *enrichissement injustifié*. If it applies, the claimant ‘has no action’. So, for example, where a claimant has, or has, and then subsequently loses, a *condictio indebiti*, there simply is no enrichment action on the facts.

It is unclear how the instant principle applies to Evans-Jones’ conception of the interaction of Scotland’s general enrichment principle and the established categories of enrichment liability. Criticism will not, therefore, be attempted.

B. Plurality

A relationship of subsidiarity positively requires the existence of at least two entities, or groups of entities. Without a plurality of entities, no relationship would be possible at all in a given context, and whatever authority existed in that context would lie unconditionally with the only relevantly extant entity.

The relationship between *enrichissement injustifié* and *negotiorum gestio* does not satisfy the instant principle. There can be no relationship of subsidiarity between them, because articles 1301-5 and 1303-3 of the *Code civil* combine to prevent an action in *enrichissement injustifié* from existing when an action *negotiorum gestorum* exists. So

these institutions will never form part of a plurality of coexistent entities, capable of being in a relationship of subsidiarity.

The relationship between the action in *enrichissement injustifié* and the *condictio indebiti* does not satisfy the instant principle, either. According to article 1303-3, the presence, on a given set of facts, of an open or legally barred *condictio indebiti*, means that there can be no action in *enrichissement injustifié* on those facts. The two can never relevantly co-exist. One thing cannot be in a relationship with another thing, if one of those things does not exist.

Evans-Jones' account of the relationship between the Scots general enrichment principle and the established categories of enrichment liability does not satisfy the instant principle. A gap-filling approach to general enrichment liability obviously means that it will never arise at the same time as, say, a *condictio causa data causa non secuta*. If two things cannot co-exist, they cannot be in a relationship with each other at all – let alone one of subsidiarity.

C. Overlap

For a rule of subsidiarity to be relevant in any context, at least two entities in that context must be capable of overlapping if unrestrained. Otherwise, there would be nothing for a conditional rule of subsidiarity to do.

The claim that *enrichissement injustifié* is subsidiary to *negotiorum gestio* does not satisfy the instant principle. This is because, as will be explained in more detail when the claims in this chapter are re-analysed in part III(A), the concurrence of *enrichissement injustifié* and *negotiorum gestio* on the same set of facts is substantively impossible. So there is nothing – no potential overlap – for a rule of subsidiarity to prevent. On this basis, article 1301-5 of the *Code civil* cannot be a rule of subsidiarity.

Turning to *enrichissement injustifié* and the *condictio indebiti*, it seems clear that both routes to relief could theoretically apply to an identical set of facts. So if article 1303-3

did not exist, these actions could overlap with each other. Here, the French law satisfies the instant principle.

As to the Scots general enrichment principle and the established categories of enrichment liability, it is equally clear that the general principle against unjustified enrichment can overlap with at least some of the established instances of enrichment liability. The Scots law satisfies the instant principle, too.

D. Meta-authority

For a rule of subsidiarity definitively to resolve questions of allocation and overlap, it must bind the relevant entities by constituting an independent, higher authority in relation to them. If this were not so, and the relevant entities could manage their relations without an independent, higher, organising rule (as, for example, would be the case if one of them were sovereign and could dictate any relevant interactions), there would be no need for subsidiarity. This is subsidiarity as meta-authority. A rule of subsidiarity is what dictates whether the entities to which it applies have competence or authority, however they might behave if unrestrained. And the condition, howsoever framed, on which allocation takes place, goes to the general essence of subsidiarity.

It is suggested that article 1301-5 of the *Code civil* would be a meta-authority in relation to an action in *enrichissement injustifié* an action *negotiorum gestorum* which is barred by an obstacle of law, if only they could exist simultaneously. If an action *negotiorum gestorum* is open, then article 1301-5 preserves the application of article 1303-3, which prevents an action in *enrichissement injustifié* from ever *formally* coexisting with the former kind of action. And, again, as will be explained properly in part III(A), their *substantive* co-existence is impossible also. However, for completeness' sake, it is worth pursuing the analysis on the basis that the actions are indeed capable of co-existing. To be a meta-authority, article 1301-5 must be an independent, higher authority in relation to the institutions to which it applies.

First, article 1301-5's independence from both *enrichissement injustifié* and *negotiorum gestio* is confirmed by three points. In the first place, the rule which article

1301-5 instates has never been declared part of either institution to which it refers. Indeed, no similar provision appeared among the previous provisions of the *Code civil* on *negotiorum gestio* (ex arts 1372-1375);³⁶ and the courts previously endorsed a position straightforwardly contrary to article 1301-5.³⁷ In the second place, this historical argument is supported by article 1301-5's reference to the conditions of each institution. This suggests that *it* is separate from *them*, and that they are separate from each other: article 1301-5 takes into account the possibility that the conditions of *negotiorum gestio* will be unsatisfied, and directs the claimant to the conditions of *enrichissement injustifié* in that event. In the third place, this textual argument is supported by academic commentary. Remarking on article 1301-5's novelty, Nicolas Dissaux and Christophe Jamin have called it a simple 'exit door', not previously found in the *Code civil*.³⁸ François Chénéde has called it a 'gateway [*une passerelle*] between *negotiorum gestio* and *enrichissement injustifié*', which makes the latter 'a fallback solution [*une solution de repli*]'.³⁹ These remarks suggest that article 1301-5's rule is not integral, either to *negotiorum gestio*, or *enrichissement injustifié*.

Secondly, article 1301-5 is a higher authority in relation to *enrichissement injustifié* and *negotiorum gestio*. It operates to preserve the latter's competence against the former, whilst it is able to come to a claimant's aid by maintaining the application of article 1303-3. And when *negotiorum gestio* is found wanting, it liberates *enrichissement injustifié* from the strictures of article 1303-3. In this, article 1301-5 uses a conditional formula to regulate definitively the competence, in relation to each other, of the institutions to which it refers.

We move on to consider the interaction of *enrichissement injustifié* with, on the one hand, open actions based on *negotiorum gestio* and, on the other, *condictiones indebiti* (whether open or legally barred), governed by article 1303-3. The rule in that article of the *Code civil* is not a meta-authority in relation any doctrine to which it

³⁶ See CA Douai, 21 September 2017, RG n° 16/05574.

³⁷ Recall Civ 1re, 26 June 1990 (n 16); Civ 3e, 29 April 1971 (n 16).

³⁸ N Dissaux and C Jamin, *Réforme du droit des contrats, du régime général et de la preuve des obligations* (Dalloz 2016) 150: 'une porte de sortie'.

³⁹ F Chénéde, *Le nouveau droit des obligations et des contrats* (2nd edn, Dalloz 2018) [132.15]; See also G Chantepie and M Latina, *La réforme du droit des obligations – Commentaire théorique et pratique dans l'ordre du Code civil* (2nd edn, Dalloz 2018) 658-659; O Deshayes, T Genicon and YM Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations – Commentaire article par article* (2nd edn, Lexis Nexis 2018) 620.

applies. A settled line of cases confirms that it is an 'inherent condition' of the action in *enrichissement injustifié*.⁴⁰ So the rule is not sourced independently of that action, one of the entities to which it is supposed to apply. And it does not actually govern any potential action *negotiorum gestorum* or *condictio indebiti* which might come under its formula, either. It works by making the action in *enrichissement injustifié* disappear in the face of either kind of other action, whether open or legally barred. For example, the *condictio indebiti* decides for itself, so to speak, what it is, or is not, going to do, and there is nothing in article 1303-3 that can change that. Rules which are not independent, and cannot actually govern the things to which they apply, are not rules of subsidiarity.

It is hard to be sure what kind of rule Evans-Jones envisages to govern relations between the Scots general enrichment principle and the established categories of enrichment liability. Criticism will not, therefore, be attempted.

E. Not sovereignty

For a relationship of subsidiarity to exist, no entity said to be part of that relationship can be sovereign over any other entity in that relationship. In such a situation, there would be nothing for subsidiarity to do, because authority in that context would be allocated *unconditionally*. This goes against the essence of subsidiarity – as argued in chapter 2, subsidiarity is a *conditional* idea. The above French law and scholarship does not satisfy this principle.

Turning first to when *enrichissement injustifié* is allowed to operate where *negotiorum gestio* is legally barred, it appears that article 1301-5 of the *Code civil* manages their respective application to the same facts. Neither action – neither entity – dictates to the other whether and when it can operate. The instant principle is therefore satisfied here.

⁴⁰ See Civ 1re, 4 April 2006, pourvoi n° 03-13986, *Bull civ I*, n° 194; [2006] RLDC, n° 28, 11, observations by S Doireau: 'le caractère subsidiaire reconnu à l'action fondée sur le principe de l'enrichissement sans cause ne constitue pas une fin de non recevoir au sens de l'article 122 du nouveau Code de procédure civile mais une condition inhérente à l'action'; CA Rennes, 18 December 2007, RG n° 06/00867; CA Nîmes, 8 January 2008, RG n° 04/01413; CA Basse-Terre, 5 January 2009, RG n° 05/01889; CA Douai, 26 October 2009, RG n° 08/06633; CA Limoges, 4 March 2013, RG n° 12/00560; CA Metz, 21 September 2017, RG n° 17/00339.

Turning next to *enrichissement injustifié*, open actions based on *negotiorum gestio*, and *condictiones indebiti* (both open and legally barred), article 1303-3 governs their relations. The position of French law here does not satisfy the instant principle. Whenever, for example, a *condictio indebiti* exists, or did, until barred by an obstacle of law, one of the inherent elements of *enrichissement injustifié* – the rule in article 1303-3 – operates to give way to the *condictio indebiti*. This suggests that the latter is sovereign over the former, and so these institutions cannot be in a relationship of subsidiarity.

It is hard to be sure what kind of rule Evans-Jones envisages to govern relations between the Scots general enrichment principle and the established categories of enrichment liability. Criticism will not, therefore, be attempted.

F. Not concurrence

An extant relationship of subsidiarity is incompatible with the free concurrence of the entities said to be part of that relationship. Conditionality would be absent in such a situation, since competence would not be ordered in any way at all. The whole point of subsidiarity is to prevent concurrence which is happening, or might happen, as argued in chapter 2.

As to *enrichissement injustifié* and *negotiorum gestio*, the position instated by article 1301-5 of the *Code civil* does not infringe the instant principle: the rule clearly prevents any state of open concurrence between the two doctrines. That is the central concern of subsidiarity.

As to *enrichissement injustifié* and the *condictio indebiti*, article 1303-3 governs their relations. The position which it produces does not infringe the instant principle, either, again because it prevents any overlap between the institutions the interrelation of which it exists to manage.

Evans-Jones' rule would certainly not infringe the instant principle. Though it is hard to evaluate it against three of the principles addressed in this part of the chapter, it is

certain that the whole point of Evans-Jones' desired rule is to prevent the concurrent application of the general principle and established instances of enrichment liability.

III. RE-ANALYSIS OF THE CLAIMS

This part of the chapter attempts explanations of the sources which do not rely upon subsidiarity.

A. France

We will first address the interaction of *enrichissement injustifié* with *negotiorum gestio*. Then, we will turn to *enrichissement injustifié* and the *condictio indebiti*.

As to the former relationship, let us first consider articles 1301-5 and 1303-3 of the *Code civil* as provisions which would prevent the concurrence of an open action *negotiorum gestorum* with an action in *enrichissement injustifié*. The point has been made above that their concurrence is formally impossible, because article 1301-5 preserves the usual application of article 1303-3 to such a situation. It was also indicated above that their substantive concurrence is also impossible. Here is why. As the *Code civil* now confirms,⁴¹ *negotiorum gestio* will only operate when the intervenor acts out of altruism,⁴² or, altruistically, and with only *partial* self-interest.⁴³ These are both legal bases for enrichment under *enrichissement injustifié*, in the presence of which such an action will fail for want of injustice.⁴⁴ This means that there is no need

⁴¹ *Code civil*, 1301, 1301-4(1): 1301, 1301-4(1): 'A person who, without being bound to do so, knowingly and usefully manages another's affairs [...]. – A personal interest in the intervener in taking on the affairs of another person does not exclude the application of the rules governing management of another's affairs.'

⁴² Barring an action for total self-interest: Civ, 25 June 1919; [1921] S, I, 12; Civ 1re, 28 May 1991, pourvoi n° 89-20258, *Bull civ I*, n° 167; [1992] RTD civ 96, observations by J Mestre.

⁴³ Allowing an action in the presence of partial self-interest (ie, intervention in the *common* interest of both the intervenor and the person whose affairs are managed): Req, 20 December 1910 (two *arrêts*); [1911] DP, I, 377, noted by M Planiol; Civ 1re, 12 January 2012, pourvoi n° 10-24512, *Bull civ I*, n° 4; [2012] D 1592, noted by A Gouëzel; [2012] RTD Civ 115, observations by B Fages. See further F Chénéde, 'La gestion d'affaires intéressée: la réforme du droit des quasi-contrats au secours des concubins?' [2017] D 71.

⁴⁴ *Code civil*, arts 1303-1, 1303-2(1): 'An enrichment is unjustified where it stems neither from the fulfilment of an obligation by the person impoverished nor from his intention to confer a gratuitous benefit. – There is no restitution where the impoverishment stems from an act done by the impoverished person with a view to his personal benefit.' Rejecting both *negotiorum gestio* and an *action de in rem verso* in the presence of sole self-interest: Civ 1re, 5 July 1988 (n 15). Also in favour of the altruism / gratuitous intent objection is CP Filios, *L'enrichissement sans cause en droit privé français* (Bruylant

to use subsidiarity to prevent the unwanted intrusion by *enrichissement injustifié* into the proper domain of *negotiorum gestio*. Where overlap between entities cannot occur, no one of them can be subsidiary to another.

Let us next consider article 1301-5 of the *Code civil* as an exception to the obstacle of law bar. The application of article 1301-5 in a claimant's favour seems most probable when the intervenor's management takes place without the intervener's full knowledge, as where a farmer works the wrong field, which belongs to his or her neighbour; or perhaps when the condition that any intervention be useful is unsatisfied, as where the neighbouring farmer whose field was worked has already decided to leave the land in question fallow.⁴⁵ Given that unjustified enrichment's subsidiarity is now all but absolute, the exception which concerns us is striking. Though not hostile to this development, commentators have not analysed it at length.⁴⁶ Attempts to discover Professor Bénabent's original motivation for it have failed. Speculation: the question is one of policy. After *enrichissement injustifié*'s independence from *negotiorum gestio* was clarified by the *arrêt Boudier*,⁴⁷ the work of authors such as Demolombe, discussed in part I(B) of this chapter, does not explain article 1301-5. If not justified because the *action de in rem verso* is an offshoot of *negotiorum gestio*, it is perhaps an admission that the latter is unadapted to modernity.⁴⁸ So recently codified, *negotiorum gestio* will not be abolished soon. Even so, article 1301-5 may be

1999) no 541; approving F Goré, *L'enrichissement aux dépens d'autrui* (Dalloz 1949) 272. Favouring the possibility of concurrence, but failing, in particular, to meet the objection based on altruism's being a justification for enrichments, see N Almosnino, *Le caractère subsidiaire de l'action de in rem verso* (LGDJ 1931) 112-114, 126; citing Cour de Poitiers, 2 December 1907; [1908] DP, II, 332; [1908] RTD Civ, observations by R Demogue. But the court (i) held that it did not matter whether, as in the court below, the action was treated as one in unjustified enrichment, or was based on an 'innominate quasi-contract deriving from a contract for services' ('*contrat de louage de services*'); (ii) did not specifically mention *negotiorum gestio* (as confirmed by Demogue in his observations, since, after acknowledging the juridical bases put forward in point (i), he suggests that 'one might also see a *negotiorum gestio* in the case'); and (iii) only ever conceived that *one* action could be possible – not that two or more might concur on the same facts. The decision cannot, therefore, bear the weight placed upon it. For further discussion of the case, see Bout (n 6) no 55.

⁴⁵ This could still, of course, enrich the neighbouring farmer (and so satisfy the rules in article 1301-5, and 1303), who might be saved work maintaining the fallow field that year, or preparing it for planting the next. For the conditions of liability mentioned in each example, see *Code civil*, art 1301.

⁴⁶ See, eg, stating simply that the rule is not a bad thing ('*ne nuit pas*'), Chantepeie and Latina (n 39) 658. Similarly accepting, but uncritical, are Deshayes, Genicon and Laithier (n 39) 620.

⁴⁷ Req, 15 June 1892; [1892] DP, I, 596; [1893] S, I, 281, noted by J-E Labbé.

⁴⁸ See E Descheemaeker, 'Quasi-contrats et enrichissement injustifié en droit français' [2013] RTD Civ 1, 16: 'the institution should quite simply disappear. [...] [It] was born of precise needs of roman society with regard to the legal representation of absent persons. The causes of its appearance have long disappeared, but their effects remain.' See further J Kortmann, *Altruism in Private Law* (OUP 2005) 99-102.

evidence that the legislator recognises the difficulty of proving *negotiorum gestio*, and that, as a matter of policy, it is nevertheless unfair – *inéquitable* – to deny well-meaning claimants a second chance in court. Put simply, the legislator is whittling away casuistically at the once steadfast rule of subsidiarity.

We will now examine the interaction of *enrichissement injustifié* with the *condictio indebiti*. In short, the latter's ousting the former can sometimes be justified by the maxim *specialia generalibus derogant*. Further, there may be also no need for that principle, or subsidiarity, because neither action will exist on a given set of facts. Yet further, it is possible that only *enrichissement injustifié* is at work on a given set of facts, similarly removing any need at all for an organising principle.

The unavailability of the action in *enrichissement injustifié* in the presence of an open and barred *condictiones indebiti* can sometimes be analysed in part as an application of the maxim *specialia generalibus derogant*: the more specific rule derogates from the more general rule.⁴⁹ It is not necessary to claim that the rules which make up *enrichissement injustifié* are truly part of France's *droit commun* – rules the application of which in a given field is not restrained by more focused ones.⁵⁰ They probably are not, for they do not apply to every instance of a *quasi-contrat* until derogated from, unlike, for example, general rules of contract law,⁵¹ or delict.⁵² Rather, they relate to a *special* kind of *quasi-contrat*. But this does not matter.

The maxim *specialia generalibus derogant* can function as between *quasi-contrats* themselves, ie, as between *enrichissement injustifié* and the *condictio indebiti*. Rather

⁴⁹ See H Roland and L Boyer, *Adages du droit français* (4th edn, Litec 1999) no 418.

⁵⁰ F Pollaud-Dulian, 'Du droit spécial au droit commun – et retour' in N Antaki and others (eds), *Aspects actuels du droit des affaires – Mélanges en l'honneur de Yves Guyon* (Dalloz 2003) 935; C Goldie-Genicon, 'Droit commun et droit spécial' (2013) 7 RD Assas 29, 31.

⁵¹ The *Code civil*, art 1105, provides: 'Whether or not they have their own denomination, contracts are subject to general rules, which are the subject of this sub-title. Rules particular to certain contracts are laid down in the provisions special to each of these contracts. The general rules are applied subject to these particular rules.' F Chénédé, 'Interprétation et amélioration du nouveau droit des contrats' [2017] D 2214, no 5. In favour of this provision, see N Balat, 'Réforme du droit des contrats: et les conflits entre droit commun et droit spécial?' [2015] D 699.

⁵² *Code civil*, art 1240, provides (emphasis added): 'Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it.' For the censure of a lower court for failure to apply this provision (ex art 1382) in the absence of a special regime, see Civ 1re, 11 January 2005, pourvoi n° 02-19016, *Bull civ I*, n° 13; [2005] RTD Civ 375, observations by J Hauser.

than requiring the existence of at least one set of rules which are genuinely part of the *droit commun*, the maxim operates simply where some rules are more special than others, and if one set of (more special) rules' field of application is covered by that of a more general set;⁵³ and it may apply to suggest that a more specific regime would be rendered ineffective were it beset by the more general one.⁵⁴ In our case, it can apply to suggest that the more specific requirements of the *condictio indebiti* cannot be stultified by recourse to *enrichissement injustifié*. Since both institutions are constituted in regimes of special rules, they are to be interpreted strictly to ensure that they stay within proper bounds.⁵⁵

There is considerable doubt over precisely when the *condictio indebiti* and *enrichissement injustifié* could overlap if unrestrained. It is not possible to address the details. French law is yet to work them out for itself. They primarily concern the interaction of the *condictio indebiti* with property and delict, and the question whether the *condictio* really covers matters which belong elsewhere.⁵⁶ However, we can exercise caution in the light of them, and confine ourselves to demonstrating the explanatory potential of *specialia generalibus derogant* with an uncontroversial example of potential overlap between the *condictio indebiti* and *enrichissement injustifié*.

The clearest instances of this are when money or the value of services are received, in good faith, without their being owed. The *Code civil*'s headline provision on *enrichissement injustifié*, article 1303, easily encompasses such cases. So do the rules of the *condictio indebiti*, in articles 1302, 1302-1, 1302-2, first sentence, 1302-3, first sentence, referring to remedies provisions in article 1352ff, the most relevant being articles 1352-6, -7, and -8. Of note for our purposes is that the conditions of

⁵³ For the censure of lower courts for failure to apply the 'more special' among concurrently applicable special rules, see Civ 3e, 26 January 2017, pourvoi n° 15-27580, *Bull civ* III, forthcoming; Com, 8 February 2017, pourvoi n° 15-23050, *Bull civ* IV, forthcoming; [2017] RTD Civ 372, observations on both decisions by H Barbier.

⁵⁴ Clarifying that the maxim does not always apply systematically to exclude more general rules, and that stultification is a reason why it might, N Balat, *Essai sur le droit commun* (LGDJ 2016) nos 158-178 esp nos 162, 168, 169, 177.

⁵⁵ Req, 26 July 1928; [1929] S, I, 70; Civ, 30 June 1971; [1971] D 477: 'dérogatoire du droit commun en la matière, ladite disposition doit être interprétée restrictivement et ne saurait trouver application en dehors du cas visé'.

⁵⁶ Descheemaeker (n 48) 16-21; E Descheemaeker, 'The New French Law of Unjustified Enrichment' [2017] RLR 77, 18-23.

liability under the *condictio indebiti* and *enrichissement injustifié* will sometimes differ. A key question is when a mistake is required under the former doctrine, and we will use this to clarify the potential of *specialia generalibus derogant*, or indeed the necessity of any mechanism, in analysing the relationship between the *condictio indebiti* and *enrichissement injustifié*.

The *condictio indebiti* can arise in three sets of circumstances. In what follows, it should be assumed that benefits are money or the value of services, and that these are always received in good faith. First, a non-debtor *solvens* may confer a benefit upon a non-creditor *accipiens*: no debt exists at all. This scenario is covered by article 1302 of the *Code civil*, the first limb of which provides:

‘Every payment presupposes a debt; something which is received without being due is subject to restitution.’

No mistake by the party impoverished is required in this scenario.⁵⁷ Referred to as *indu objectif*, because the problem is with the existence of the debt rather than the persons impoverished or enriched (*indu subjectif*),⁵⁸ an action will fail if there is donative intent on the part of the claimant *solvens*.⁵⁹ This kind of *condictio indebiti* cannot overlap with *enrichissement injustifié*, because neither exists if no debt exists. If the benefit were due, neither doctrine would apply on a set of facts, and neither *specialia generalibus derogant* – nor subsidiarity – would be needed.

Secondly, a debtor *solvens* may confer a benefit upon a non-creditor *accipiens*: the wrong person is enriched in respect of a debt owed to somebody else. This scenario is covered by article 1302-1 of the *Code civil*, which states:

‘A person who receives by mistake or knowingly something which is not owed to him must restore it to the person from whom he unduly received it.’

⁵⁷ Ass plén, 2 April 1993, pourvoi n° 89-15490, *Bull ass plén*, n° 9; [1993] D jur 373, conclusions by M Jeol AG; [1993] RTD Civ 820, observations by J Mestre; [1994] D 14, observations by J-L Aubert; Civ 1re, 20 January 1998, pourvoi n° 96-11176, *Bull civ I*, n° 18; [1998] D 500, noted by DR Martin.

⁵⁸ For both expressions, and an example of *indu objectif* in the form of a double payment, see Civ 1re, 16 May 2006, pourvoi n° 05-12972, *Bull civ I*, n° 218.

⁵⁹ Soc, 5 April 2005, pourvoi n° 02-45784.

This provision refers to the irrelevance of mistake and knowledge in relation to the *accipiens*, the party *enriched*. There will often be a mistake by the *solvens*, the party impoverished, on the facts.⁶⁰ But the *Code civil* is silent on the question whether this is actually a requirement in the scenario under consideration. The courts have not decided the point definitively, either.⁶¹ And the question divides academic opinion.⁶² If a mistake is required here, then *specialia generalibus derogant* may apply to explain the denial of *enrichissement injustifié* where the *condictio* is both open and barred. In either eventuality, its special condition would be stultified if it would be circumvented.

Thirdly, a non-debtor *solvens* may confer a benefit upon a genuine creditor *accipiens*. In other words, a person may pay another's debt. This scenario is covered by article 1302-2 of the *Code civil*, which provides:

‘A person who by mistake or under constraint has discharged another person's debt can sue the creditor for restitution. However, this right ceases in the situation where the creditor, as a result of payment, has cancelled his instrument of title or has released any security guaranteeing the right arising from the obligation.

⁶⁰ See, eg, Com, 23 June 1987, pourvoi n° 86-12820; CA Chambéry, 18 January 2018, RG n° 17/00520; CA Fort-de-France, 15 May 2018, RG n° 17/00236.

⁶¹ See, CA Angers, 18 October 2011, RG n° 10/02582. During a lengthy preliminary description of the differences between *indu subjectif* and *indu objectif*, the court appeared to assume that mistake by the *solvens* is required where a genuine debtor pays the wrong person (a non-creditor). However, this is an apparently isolated lower court decision, and, though there happened to be a mistake on the facts, the court correctly reasoned on the basis of *indu objectif*. It does not provide a definite answer to our question.

⁶² Textual analysis suggests that mistake is not required: Fabre-Magnan (n 7) 493; P Rémy, ‘Des autres sources d'obligations’ in F Terré (ed), *Pour une réforme du régime général des obligations* (Dalloz 2013) 38-39; P Malinvaud, D Fenouillet and M Mekki, *Droit des obligations* (14th edn, Lexis Nexis 2017) 751-752. In addition, it is unclear why a non-creditor defendant should be protected by a mistake requirement in the same way as a creditor defendant: Bénabent (n 12) no 467, cross-referring to no 465. However, others accept a mistake requirement: F Terré, P Simler and Y Lequette, *Droit civil: Les obligations* (11th edn, Dalloz 2013) no 1055; citing J Flour, J-L Aubert and E Savaux, *Les obligations, II: Le fait juridique* (14th edn, Sirey 2011) no 26. Favoursing mistake where a debtor *solvens* enriches a non-creditor *accipiens*, the latter authors argue unconvincingly that the *solvens* owes something to somebody, so should be made to prove that it has made a mistake to discount donative intent, or intention to manage another's affairs. This is not self-evident: F Terré et al and F Chénéde, *Droit civil: Les obligations* (12th edn, Dalloz 2018) no 1219. A mistake requirement is hard to accept. Where the *accipiens* is not a creditor, either of the *solvens* or a third party on whose behalf payment is made, there should simply be a requirement of no donative intent in the *solvens*.

Restitution may also be claimed from a person whose debt has been discharged by mistake.'

This provision explicitly requires a mistake by the *solvens*. Cases confirm this, and further accept the possibility of an action where the *solvens* is forced to pay the *accipiens*.⁶³ Article 1302-2 covers two kinds of action. The first lies against the creditor of the person whose debt has been paid.⁶⁴ In such a case, *specialia generalibus derogant* may apply. If the simple absence of donative intent or self interest were required, the maxim would be redundant, because the *condictio*'s conditions of liability would then match those of *enrichissement injustifié* and each action would fail.⁶⁵ But as things are, it might be argued that it should not be possible to mitigate an inability to prove a mistake by recourse to the more general enrichment action.

Article 1302-2 also provides an action against the proper debtor whose debt has been paid. Previous doubt about whether this action was based properly on *enrichissement sans cause*,⁶⁶ *negotiorum gestio*,⁶⁷ or the *condictio indebiti*,⁶⁸ may now have been resolved,⁶⁹ in favour of the latter.⁷⁰ The rule about recourse against the proper debtor is located with the others on *paiement de l'indu*, and the specific reference, in the second limb of article 1302-2 to *restitution*, indicates the application of the common restitutionary regime to which the other variations of the *condictio* are also subject.⁷¹ In reality, however, it is hard to see how this can really be anything other than a poorly

⁶³ Com, 5 May 2004, pourvoi n° 02-18066, *Bull civ IV*, n° 85; [2004] Cont conc consomm n°s 8-9, August, comm 123, commentary by L Leveneur, quashing the court below for failing to assess whether there had been error or duress.

⁶⁴ See further W Dross, 'L'article 1377 du Code civil a-t-il encore un avenir à la Cour de cassation?' in O Cachard and X Henry (eds), *Mélanges en l'honneur du Professeur Gilles Goubeaux* (Daloz/LGDJ 2009).

⁶⁵ For an example, where donative intent discounted both, see CA Aix-en-Provence, 14 June 2016, RG n° 15/05761.

⁶⁶ Civ 1re, 4 April 2001, pourvoi n° 98-13285, *Bull civ I*, n° 105; [2001] Defrénois 721, observations by J-L Aubert; [2001] D 1824, observations by M Billiau; [2002] LPA 2 April n° 66, 9, noted by A Gosselin-Gorand; [2002] JCP G, I, 134, n° 18, observations by A-S Barthez; Civ 3e, 2 April 2008, pourvoi n° 07-10101, *Bull civ III*, n° 64.

⁶⁷ Civ 1re, 12 January 2012 (n 43).

⁶⁸ Civ 1re, 13 October 1998, pourvoi n° 96-22515, *Bull civ I*, n° 299; [1999] D 116, noted by L Aynès; Soc, 20 December 2001, pourvoi n° 99-21671, *Bull civ V*, n° 395.

⁶⁹ For approval, see V Perruchot-Triboulet, 'L'indu à trois' [2003] RTD Civ 427, 439-446 esp 444.

⁷⁰ Doubtful, however, is Chénéde, *Le nouveau droit des obligations* (n 39) [133.52]; though not engaging with Perruchot-Triboulet (n 69).

⁷¹ The *Code civil*, art 1302-3 provides: 'Restitution is subject to the rules set by articles 1352 to 1352-9.'

placed action in *enrichissement injustifié*: the proper debtor is never *paid* anything. There is no need for *specialia generalibus derogant*, or subsidiarity, in this situation.

To sum up, where the *condictio indebiti* and *enrichissement injustifié* are capable of overlapping, the primacy of the former can be explained with the maxim *specialia generalibus derogant*. Where the doctrines do not overlap, for whatever reason, there is no need for any additional concept to manage their relations.

B. Scotland

Turning to the Scots material, it is difficult to tell whether Evans-Jones' is an avowedly *desired* position, or whether he believes that it represents the current law. Having seen above, in part II(B), that regardless, subsidiarity cannot explain what he believes is or should be happening, we will proceed in two steps. First, it will be shown that Evans-Jones' view does not reflect the current law. Secondly, we will ask whether the adoption of his underlying view, shorn of its subsidiarity baggage, would improve on the present position.

As mentioned in part I(A), above, the Scottish courts do not appear directly to have addressed the point with which this chapter is centrally concerned. But it is possible to sketch their attitude to the interaction of usual situations of unjustified enrichment with liability on a more general basis. The picture is different to Evans-Jones' account.

In the first place, the courts have repeatedly clarified that there exist recognised fact situations in which an enrichment will normally be found to be unjustified. Thus, Lord Hope said that a claim for repetition 'may be based upon the *condictio causa data causa non secuta*, the *condictio sine causa* or the *condictio indebiti*, depending upon which of these grounds of action fits the circumstances which give rise to the claim'.⁷² The Inner House later recognised that the existing law will often be determinative of

⁷² *Morgan Guaranty Trust Co of New York v Lothian RC* 1995 SC 151 (IH) 155 (Lord Mayfield and Lord Kirkwood concurring).

enrichment claims.⁷³ And in *Shilliday v Smith*,⁷⁴ Lord Rodger mentioned the identification of ‘various situations where persons are to be regarded as having been unjustly enriched at another’s expense’, falling into ‘into recognisable groups or categories’, which may assist in determining whether there is a relevant case. Their Lordships would not likely have mentioned these ‘grounds of action’,⁷⁵ ‘various situations’, or ‘recognisable groups’, if they were valueless and could be ignored. For Lord Rodger, ‘[a] pursuer whose case falls into’ a recognised category ‘has a ground of action under our law’.⁷⁶ More generally, it is certain, for example, that if a pursuer invokes the *condictio indebiti*, a liability mistake must be proved.⁷⁷ Nevertheless, it is important to notice that there is no mention of disastrous consequences if a relevant ground of action is not invoked or does not apply.

In the second place, other authorities clearly support the view (suggested by its omission from the cases just mentioned) that failure in an established category will not preclude success on a more general footing. In *Thomson v Mooney*,⁷⁸ for example, the Inner House simply took generalised pleadings and analysed them for itself as a *condictio causa data causa non secuta*. The action did not fail simply because it was not pre-formulated, and no criticism was levelled. In the Outer House, it has been said that ‘it may not be necessary to ascribe the claim to one of the traditional categories’ of enrichment liability, as long as the pursuer pleads on ‘some identifiable basis’;⁷⁹ and that judges are ‘no longer required to shoehorn the facts into a particular style of Roman sandal before the remedy could be made to fit’.⁸⁰ Lord Hodge captured this second strand of judicial thought in 2010. To an argument that there was, on the facts

⁷³ *Fife Scottish Omnibus v Tay Bridge Joint Board* unreported 12 June 1997 (IH, Ex Div), 1997 GWD 23-1180, [1997] Lexis Citation 582, page 13 of transcript (Lord Prosser, with whom Lord Cameron generally agreed, page 5).

⁷⁴ 1998 SC 725 (IH) 727-728 (Lord Kirkwood and Lord Caplan concurring).

⁷⁵ After Lord Hope in *Morgan Guaranty*, Lord Rodger and Lord Caplan also mentioned the phrase ‘grounds of action’ in *Shilliday*, *ibid*, 728, 731, 734.

⁷⁶ *ibid*, 728 (Lord Kirkwood and Lord Caplan concurring).

⁷⁷ *Morgan Guaranty* (n 72) 155 (‘the *condictio indebiti* is available for the recovery of money paid or property transferred under an obligation which is void but was erroneously thought to be valid’), 165-166 (the Lord President [Hope], with whom Lord Mayfield and Lord Kirkwood agreed). See also *ibid*, 168 (Lord Clyde): ‘considerations of error arise because an ingredient of the claims of this kind is that the payment should have been made in the mistaken belief that it was due’.

⁷⁸ [2013] CSIH 115, 2014 Fam LR 15 [7] (Lord Eassie, Lord Bracadale, and Lord Wheatley): ‘In our view it is clear that the claim which the pursuer advances is an example of a well recognised category of unjustified enrichment, commonly described by reference to the Roman law term *condictio causa data causa non secuta*.’

⁷⁹ *Lyon and Turnbull Ltd v Sabine* [2012] CSOH 178 [24] (Lord Brodie).

⁸⁰ *Esposito v Barile* 2011 Fam LR 67 (Sh Ct, Tayside) [17] (Sheriff Way).

before him, ‘a cause of action in the form of’ a *condictio causa data causa non secuta*, his Lordship responded that he ‘would not [...] state the submission in those terms’. He acknowledged that established categories (in the case before him, *condictiones*) may be useful in indicating circumstances in which an enrichment will be unjustified. But he noted that, fundamentally, the question is whether a person has been unjustifiably enriched at another’s expense. Precisely matching facts with *Roman condictiones* would be ‘unnecessarily rigid’ in view of Scotland’s ‘unitary principle of unjustified enrichment’.⁸¹

How to summarise these two lines of authority? At the highest level in Scotland, there is at most an *inclination* towards the view that pursuers should seek to bring their cases within one of the recognised fact patterns of enrichment liability if possible. But an inability to do this will not of itself dash all hopes of victory in unjustified enrichment. The *preference* is not a *rule*.

This is more subtle than Evans-Jones’ view, which cannot represent the current law. The relationship between what Lord Hodge called the ‘unitary principle of unjustified enrichment’,⁸² and established fact patterns, is more refined than one in which the latter are an all or nothing option, or one in which the former is a fallback and the latter are a mandatory first port of call. The following nuanced observations are instructive:⁸³

‘[I]t would perhaps be reading too much into the judgment [in *Shilliday*] to speak of a general action which is subsidiary to the discrete *condictiones* as a fail-safe catch-all. Rather one should say that the judgment seeks to create a context in which both established and new grounds of action can, respectively, be expanded and generated by the general principle.’

⁸¹ *Mactaggart & Mickel Ltd v Hunter* [2010] CSOH 130, 2010 GWD 33-683 [98]-[99].

⁸² See also his Lordship’s later reference to ‘the generalisation of the obligation to reverse unjustified enrichment’ in *Robertson Construction Central Ltd v Glasgow Metro LLP* [2009] CSOH 71, 2009 GWD 19-304 [18].

⁸³ Visser and Purchase (n 34) 267.

This passage is useful, also:⁸⁴

[In *Shilliday*,] Lord Rodger [...] did not regard the *condictiones* as autonomous ‘actions’ but rather as ‘grounds of action’ to reverse unjustified enrichment. He made no reference to a residual general enrichment action and therefore he could not consider whether such an action is or should be subsidiary. However, in Lord Rodger’s characteri[s]ation of the *condictiones* as grounds of action it is at least implicit that where a situation is covered by an existing ground of action, the limitations on that ground cannot easily be circumvented by invoking the general enrichment principle.’

It is not disputed that the *condictiones*, for example, are causes of action,⁸⁵ in the sense that they shortly express ensembles of facts which, if proved, entitle the pursuer to a remedy for unjustified enrichment.⁸⁶ But this does not entail that they systematically dominate the more general principle against unjustified enrichment. For in Scots law, unjustified enrichment *simpliciter* is clearly an obligation-creating event,⁸⁷ of which transfer (subdividing into the *condictiones*), imposition (dividing according to the kind of benefit imposed), and interference are different (and, in themselves, obligation-creating) mutations.⁸⁸

⁸⁴ N Whitty and D Visser, ‘Unjustified Enrichment’ in R Zimmermann, K Reid and D Visser (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (OUP 2004) 405. Writing solo, Whitty’s view appears subsequently to have hardened, but his contribution with Visser tacks closer to authority. See N Whitty, ‘Transco Plc v Glasgow City Council: Developing Enrichment Law after *Shilliday*’ (2006) 10 *Edinburgh L Rev* 113, 126 (emphasis added): ‘Under the new [post-enrichment-revolution] law this particular type of *subsidiarity* [between enrichment claims] has presumably taken on a new form. For so long as our enrichment law retains some specific grounds of action (for instance the *condictiones*) existing alongside a residual general ground, it is likely that the courts *will not allow* the specific grounds to be evaded by recourse to the residual general ground.’

⁸⁵ ‘A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person’: *Letang v Cooper* [1965] 1 QB 232 (CA) 242-243 (Diplock LJ); approved for Scotland in *Smith v Sabre Insurance Co Ltd* [2013] CSIH 28, 2013 SC 569 [39] (Lord Brodie, with whom Lady Paton and Lord Philip agreed).

⁸⁶ For confirmation that Evans-Jones sees the recognised instances in this way, see Evans-Jones, ‘Lord Rodger and Unjustified Enrichment’ (n 26) 443, 444-445; where an abridged version is found of Evans-Jones, *Enrichment in Any Other Manner* (n 27) [1.51]-[1.52], [3.35].

⁸⁷ *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90, 98 (Lord Hope, with whom Lord Browne-Wilkinson, Lord Jauncey, Lord Nolan, and Lord Hoffmann agreed): ‘In general terms it may be said that [a] remedy is available where the enrichment lacks a legal ground to justify the retention of the benefit.’ On this sentence, see also P Hellwege, ‘Rationalising the Scottish Law of Unjustified Enrichment’ (2000) 11 *Stellenbosch L Rev* 50, 63 *in fine*.

⁸⁸ See, eg, HL MacQueen and Lord Eassie (eds), *Gloag & Henderson: The Law of Scotland* (14th edn, W Green 2017) [24.18]: the terms used to refer to the *condictiones* ‘are not straitjackets and should be understood in their modern or Scots law rather than their Roman guise; they merely serve to distinguish

Having established that Evans-Jones' view does not represent the current law, we turn to the question whether it *should* be impossible to reason on the basis of the general principle against unjustified enrichment unless no established pattern of recovery will avail the claimant.

Scots law is close to the point envisaged by Evans-Jones. But his position should not be adopted. Currently, Scots law balances structure with flexibility. Structure is provided, both by the established instances of unjustified enrichment, covering well known fact patterns, and the general principle, marking the frontier of enrichment liability. Without Evans-Jones' brightline rule, categories and principle already combine to consolidate and clarify.⁸⁹ Clarity increases predictability and decreases uncertainty.⁹⁰ The general principle further provides *bounded* flexibility,⁹¹ in the sense of built-in potential for change according to ordinary methods of judicial reasoning,

various situations in which an enrichment remedy may be available, and it may be that some cases could be classified under more than one heading'. See also M Hogg, *Obligations* (2nd edn, Avizandum 2006) [4.17].

⁸⁹ For the importance of which, see, eg, *Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570 (HL) 612 (Lord Diplock, with whom Lord Edmund Davies, Lord Keith of Kinkel, Lord Brandon of Oakbrook, and Lord Brightman agreed): '[a]bsence of clarity is destructive of the rule of law'. For the view that clarity is at the base of rule of law compliance, see P Burgess, 'The Rule of Law: Beyond Contestedness' (2017) 8 *Jurisprudence* 480.

⁹⁰ For the importance of both generally, see N MacCormick, 'The Rule of Law and the Arguable Character of Law', in his *Rhetoric and the Rule of Law* (OUP 2005) 11, 15-16; J Waldron, 'Thoughtfulness and the Rule of Law' [2011] *Brit Acad Rev* 1; and, in the (albeit English) unjust enrichment context, *HM Revenue and Customs v Investment Trust Companies* [2017] UKSC 29, [2018] AC 275 [39]-[41] esp [41] (Lord Reed, with whom Lord Neuberger, Lord Mance, Lord Carnwath and Lord Hodge agreed).

⁹¹ The most basic effect of this, underneath which many refinements of the general requirements of liability (enrichment of the defender, at the pursuer's expense, without justification, subject to equity or defences) have taken place, is that there is no discretion to decide cases as 'a matter of mere *ad hoc* discretion': *Fife Scottish Omnibus* (n 73) page 13 of transcript (Lord Prosser, with whom Lord Cameron generally agreed, page 5); *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 237 (Lord Clyde). This has been forgotten by some: *MacKays Stores Ltd v Toward Ltd* [2008] CSOH 51 [28] (Lord Drummond Young); *Advocate General for Scotland v John Gunn and Sons Ltd* [2018] CSOH 39 [62] (Lord Uist).

usually incremental.⁹² This prevents ossification, and permits the Scottish common law to evolve, and respond to novelties.⁹³

If Evans-Jones' brightline rule were introduced, enrichment pursuers could only ever proceed from the specific to the general, rather than pass freely between principle and categories. It might be thought that this would increase the predictability and certainty of Scots enrichment law, Evans-Jones' motivation for his view. Normally, when prescriptions are more precise than vague, legal certainty improves. The contrary perhaps starts to become true, and a mix of general standards with specific ones more certain, only with regard to very complex, evolving social phenomena, involving high economic stakes (such as nationwide systems of old age care), which are less susceptible to detailed regulation.⁹⁴ However, in neither the short nor the long term would Evans-Jones' model increase legal certainty. He does not propose that pursuers should have to sue on an established cause of action, then be sent home if this fails, unable thereafter to invoke the general principle against unjustified enrichment. Rather, he simply wants pursuers to have to sue in a recognised category, *before* invoking the general principle. So on both the current and proposed models, and however much time passes, the outer limit will always be the same. The final frontier will simply be whatever are the farthest reaches of the general enrichment principle. Since certainty is the only reason Evans-Jones gives for his position, one might expect him to propose a model which would improve the current law in those terms.

Evans-Jones' preferred position would also worsen Scots enrichment law. Consider the short term first. In the first place, and since no proposal of codification is made, it is to be assumed that judicial development is envisaged. Suppose this were to happen

⁹² In *Wagener v Pharmacare Ltd* [2003] ZASCA 30, [2003] 2 All SA 167 [30], in the context of delict, Howie P (with whom Marais, Conradie, and Cloete JJA, and Jones AJA agreed) said the following about the common law's flexibility. It seems relevant. 'Mention is sometimes made of the common law as having the flexibility which allows sound incremental development as society's circumstances change. [...] The emphasis must be on incremental development, however. Flexibility does not necessarily entail the abolition of a long-standing requirement of principle or, on the other hand, the creation of what would, in effect, be an entirely new delict.'

⁹³ Rules for change are necessary, and do not imply rule of law non-compliance, provided the law remains capable of guiding human behaviour: T Endicott, 'The Impossibility of the Rule of Law' (1999) 19 OJLS 1, 8-9.

⁹⁴ J Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 Aust J Leg Phil 47, *passim* but esp 50-63, 65, 71, 75 (for abstract propositions and conclusions).

tomorrow. Evans-Jones might not go so far as to say that it would require the acceptance of his entire proposed taxonomy of unjustified enrichment, which he concedes remains academic.⁹⁵ But at the very least, it would involve upsetting the considerable body of authority, presented above, on the current interrelation of the categories of enrichment liability and the general principle. At a stroke, without any indication of what was coming,⁹⁶ we would pass from fluidity to rigidity, even though, more generally, '[i]t can hardly be doubted that the law is still in the course of development'.⁹⁷ The prospect of such a jarring change should give pause. For it goes against established judicial methods,⁹⁸ and is perhaps not predictable enough relative to its scale.⁹⁹

We turn, secondly, to the long term. Recall, in the first place, that, on Evans-Jones' model, we would always have the same relative outer limit on enrichment liability at any given point in time: the boundary of the general principle and its conceptual content, such as the notion of enrichment. In return for zero substantive improvement in legal certainty, it is possible that the cost of enrichment litigation would rise. The relevance of both general and specific bases of liability to sets of facts would probably have to be meticulously pleaded more often than under the current regime. Time and money spent might both increase.

⁹⁵ Evans-Jones, *Enrichment in Any Other Manner* (n 27) [1.52], and, for a summary of his taxonomy, [2.02], with accompanying diagram. It might be said that, following *Shilliday* (n 74), the category of enrichment by transfer, subdividing into the *condictiones*, is quite safe. But judicial approval of whether and how other cases are to be taxonomised is still to come.

⁹⁶ Unlike in South Africa, following suggestions about its similar potential change of step in *McCarthy Retail* (n 34) 487-489 (Olivier and Cameron JJA concurring); as discussed in, eg, *Afrisure CC v Watson NO* [2008] ZASCA 89, 2009 (2) SA 127 [4] (Brand JA, with whom Mpati P, Lewis JA, Combrinck JA and Boruchowitz AJA agreed).

⁹⁷ *Stork Technical Services (RBG) Ltd v Ross's Executor* [2015] CSOH 10A, 2015 SLT 160 [34] (Lord Tyre); cited with approval by Lord Woolman in *Biffa Waste Services Ltd v Patersons of Greenoakhill Ltd* [2015] CSOH 137, 2015 GWD 34-548 [29], who said that '[t]he precise contours of unjustified enrichment remain to be mapped'.

⁹⁸ A Rodger, 'Thinking about Scots Law' (1996) 1 Edinburgh L Rev 3, 11: 'Scots law has long been built by the working-out of doctrine in our case-law and that this is what gives strength to any statements of principle which may from time to time emerge.' For accord, but recalling that 'if there is no obvious answer in the case law or in statute, the Scots courts will readily seek out principle', E Reid, 'Scotland' in V Palmer (ed), *Mixed Jurisdictions Worldwide* (2nd edn, CUP 2012) 240-246 esp 245-246.

⁹⁹ Lord Bingham, 'The Rule of Law' [2007] CLJ 67, 69, 71: 'First, the law must be accessible and so far as possible intelligible, clear and predictable. [...] [W]ithout challenging the value or legitimacy of judicial development of the law, the sub-rule under consideration does [...] preclude excessive innovation and adventurism by the judges. It is one thing to alter the law's direction of travel by a few degrees, quite another to set it off in a different direction. The one is probably foreseeable and predictable [...] the other not.' See also Lord Bingham, *The Rule of Law* (Penguin 2010) 37, 45-46.

Conversely, the quality of the law could decrease. In the first place, take the brightline procedure of asking whether an established action applies, failing which the general principle may be invoked. This could mean that recognised causes of action, which could usefully be extended to cover new problems,¹⁰⁰ would remain undeveloped. It might be easier to let them fall into desuetude than continue to hammer them out on the anvil of new facts. This could produce the uneven treatment of cases without normatively attractive distinctions. So, an established category, containing an additional condition of liability, might catch a set of facts due to the kind of benefit received by the defender, when a different benefit would be addressed more generally, without the extra condition.¹⁰¹ It could also lead to an unintentional burgeoning of generalised liability. In turn, this might have the opposite effect on legal certainty which Evans-Jones desires.

In the second place, the level of depth at which unjustified enrichment disputes are argued might decrease. The multiplication of legal issues might not go hand in hand with an increase in economic stakes for the parties to cases argued in the courts. They may be unwilling or unable to pay whatever is required for full treatment of every point. And in any event, pleaders might not be allowed to place enough authorities before the courts to do this.¹⁰²

In sum, Evans-Jones' model should not be adopted for Scots enrichment law.

¹⁰⁰ As where it was unanimously confirmed, after lengthy consideration, that an error of law may satisfy the error requirement of the *condictio indebiti*: *Morgan Guaranty* (n 72) 164-165 (the Lord President [Hope], with whom Lord Mayfield and Lord Kirkwood agreed), 171-172 (Lord Clyde), 174-175 (Lord Cullen). For other authority on developing established claims, see also *First National Bank of Southern Africa Ltd v Perry NO 2001 (3) SA 960 (SCA) [28]* (Schutz JA, with whom Hefer ACJ, Zulman JA, and Brand and Nugent AJJA agreed), and the cases cited.

¹⁰¹ J du Plessis, *The South African Law of Unjustified Enrichment* (Juta 2012) 6-8.

¹⁰² See, eg, 'Court of Session Practice Note No 1 of 2017: Commercial Actions' [30](b): no more than ten authorities in joint bundle without the court's permission. For (extra-)judicial endorsement of this rule in cavalier tone, see Lord Carloway, 'How to Win Your Case – What the Court Expects from Advocates' *Advocacy: International Women's Day at the Faculty of Advocates* (8 March 2018) <<http://www.advocates.org.uk/media/2727/iwd18carloway.pdf>> 10.

CONCLUSION

The first part of this chapter surveys English, French and Scots law for claims that subsidiarity is capable of explaining the interaction of different kinds of enrichment-based and, in France's case, quasi-contractual, liability. English law was left aside. There was much material to discuss in French law and scholarship. And one prominent Scots writer has contributed relevant material.

Part two of this chapter concludes that the material which supports subsidiarity's usefulness in the context in question is *pro tanto* incorrect. As to French material, claims relating to *enrichissement injustifié* and *negotiorum gestio* infringe the second and third principles of subsidiarity developed earlier in this study, and partially infringe the fourth and fifth (in respect of open actions *negotiorum gestorum*). Claims relating to *enrichissement injustifié* and the *condictio indebiti* infringe the first through fifth principles. Evans-Jones' account of the Scots position infringes the second principle.

Part three of this chapter re-analyses the sources. As to French law, it is suggested that the concurrence on the same set of facts of an action *negotiorum gestorum* and an action in *enrichissement injustifié* is not possible. No organising mechanism is needed at all. It was further suggested that the exception to the obstacle of law bar in article 1301-5 of the *Code civil* is based on policy, and recognises the difficulty of establishing the conditions of liability in *negotiorum gestio*. Turning to *enrichissement injustifié* and the *condictio indebiti*, it seems that where the doctrines are indeed capable of overlapping, the latter's primacy is explicable on the basis of the maxim *specialia generalibus derogant*. Finally, an examination of Evans-Jones' position leaves no doubt that it would represent a marked regression from the point at which Scots law now stands.

CONCLUSION

In this brief concluding chapter, the overall findings of this study are summarised. Some suggestions on what the foregoing can offer comparative legal scholars are made, before speculation on the prospects for the subsidiarity of unjust enrichment in England, France, and Scotland.

I. SUMMARY

This study first laid foundations, by briefly outlining basic features of English, French, and Scots law, necessary to an understanding of its examination of the subsidiarity of unjust enrichment (chapter 1). Six principles of subsidiarity were then derived from a linguistic and contextual perspective (chapter 2), and the status of, and reasons for, subsidiarity in the law and scholarship of unjust enrichment were outlined (chapter 3).

Turning from the general to the specific, this study attempted to show, first, that none of the material which it surveys correctly claims that unjust enrichment is subsidiary to statute, property, contract, tort or delict (chapters 4-7). Secondly, it has been argued that the obstacle of fact permission in French law cannot be about subsidiarity, either (chapter 8). Thirdly, claims that subsidiarity correctly describes any of unjust enrichment's internal workings were similarly criticised (chapter 9).

Having dispatched subsidiarity, analyses to replace it were suggested. The relationship between unjust enrichment and statute, and unjust enrichment and contract, can certainly be best explained via the requirement that an enrichment be unjust: inconsistent statutes and contracts render enrichments which they cover *just*, with the result that there is no unjust enrichment on the field of play (chapters 4 and 6).

As to unjust enrichment and property (see chapter 5), it was suggested that the current state of the English authorities (taken at face value, rather than debated) can be explained without subsidiarity, adopting the view that title justifies enrichments. There is less debate about French law's commitment to the underlying legal rules, and so this explanation was more straightforwardly suggested for them. And whilst Scottish

legal discourse contains no significant claims that unjustified enrichment is subsidiary to property, the authorities were examined, and it was found that the same analysis is suitable for them, too.

As to the French law of unjustified enrichment and delict, it was suggested that there is simply no relevant interaction to explain, since the two institutions are incapable of overlap in a manner to which adherents of subsidiarity object (chapter 7). And the body of law and doctrine about the French obstacle of fact permission in fact gives exaggerated importance to a set of quite unremarkable situations of unjustified enrichment which, as ever, simply require careful analysis (chapter 8).

Turning, lastly, to relations between different kinds of enrichment claim (see chapter 9), France's doctrine of *negotiorum gestio* and *action en enrichissement injustifié* cannot overlap, and so, in common with relations between France's law of delict and unjustified enrichment, they do not interact in a manner with which this study concerns itself. And to the extent that they can overlap, the primacy of France's *condictio indebiti* over *enrichissement injustifié* can be explained with the maxim *specialia generalibus derogant*. As to Evans-Jones' account that Scotland's general enrichment principle is subsidiary to other kinds of enrichment claim, this was found not to represent the law. This is positive, since, if correct, it would not improve legal certainty – the only reason for its being proffered – and could seriously worsen Scots enrichment law.

II. COMPARISON

The value of comparative approaches to unjust enrichment was recognised at the outset of this study.¹ But we should not forget Robert Stevens' warning that '[c]omparative law is a dangerous business'.²

'Comparison of narrow legal rules may mislead unless done in context as apparent inconsistencies may be explicable by more fundamental structural difficulties. Harmonisation of individual rules may increase rather than remove the dissonance between different systems and runs the risk of creating incoherence within individual systems.'

Despite having encountered no such complex problems, we are left with a case study in the potential unhelpfulness of comparative material, unless it is digested and employed with care.³

As shown in part I(B) of chapter 3, in building their account of the subsidiarity of unjust enrichment, Grantham and Rickett make extensive use of comparative scholarship. The puzzle is how the forceful criticism of subsidiarity in that material went unaddressed, and appears not even to have given pause for thought. In turn, Grantham and Rickett's account influenced the acceptance of subsidiarity by Rohan Havelock and Graham Virgo. So it forms part of, and has contributed to, an unfortunately substantial foothold for subsidiarity in English enrichment scholarship.

Turning to the Scottish material, scholarly engagement with the comparatists has been quite detailed, as seen especially in Hector MacQueen and Niall Whitty's work (summarised in part III(B) of chapter 3, a fuller account of some of both authors' output being given in part I(C) of chapter 6). This is perhaps due to a more general

¹ See also, eg, HLE Verhagen, 'The Policies against Leapfrogging in Unjust Enrichment: A Critical Assessment' (2018) 22 Edinburgh L Rev 55, 56: 'In past decades the comparative approach has proven to be extremely fruitful for unjust enrichment'.

² A Burrows and others, 'The New Birksian Approach to Unjust Enrichment' [2004] RLR 260, 270. For recent expression of similar sentiments in an apex court, see *Roering NO v Mahlangu* [2016] ZASCA 79, 2016 (5) SA 455 [49] (Wallis JA, with whom Willis, Saldulker and Zondi JJA and Tsoka AJA agreed).

³ Recall the caution (outlined in part I(B) of chapter 3), based on comparative work, accurately read, and appropriately cited, of C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [2-04].

Caledonian feeling that, '[i]n an important sense, all good lawyers are now comparative lawyers', and is but a small example of '[t]he comparative law enterprise' which 'has changed the nature of private law scholarship in Scotland'.⁴ Whilst it has not prevented this study from suggesting areas for improvement (see, eg, the analysis of Whitty and MacQueen's work in part II of chapter 6), comparison seems directly responsible, at least in part, for some healthy scepticism in Scotland about subsidiarity.

However, the picture is broader. Robin Evans-Jones uses a considerable amount of comparative material. First, he employs it, on occasion, similarly to Grantham and Rickett. Under the rubric of subsidiarity, he endorses a rule that failure to prove a contract should prevent a claim in unjustified enrichment. This rests on an approval of the *arrêt Clayette*, 'discussed by B[arry] Nicholas'.⁵ But the latter's treatment of that decision, with other cases, leads him to suggest that 'subsidiarity [...] hardly merits separate treatment'.⁶ Whether one is minded to approve *Clayette*'s holding or not, Nicholas' uncompromising position might prompt questions about whether it can be rationalised using subsidiarity. Secondly, Evans-Jones' reference to comparative sources reminds us that they are not a panacea. His subsidiarity-based understanding of the relationship between general and specific grounds of enrichment liability (set out in full in part I(C) of chapter 9, and analysed in part III(B) of the same) relies on multiple comparative sources. These are either quite neutral on subsidiarity,⁷ or strongly in favour of it.⁸ So this use of comparative material cannot be criticised in the same way as the first one identified in this paragraph. The lessons here are different. In the first place, reliance on international perspectives only assists if one's own law is

⁴ K Reid, 'Smoothing the Rugged Parts of the Passage: Scots Law and Its Edinburgh Chair' (2014) 18 *Edinburgh L Rev* 315, 330, 331. A good example of Scottish openness to comparative law is the Scottish Law Commission's work on contract. See, latterly, Scottish Law Commission, *Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Scot Law Com No 252, 2018) esp ch 1.

⁵ R Evans-Jones, *Unjustified Enrichment, II: Enrichment Acquired in Any Other Manner* (W Green 2013) [7.20] and note 36; citing Civ, 12 May 1914; [1914] D Chron 56; [1914] Pandectes, Bull somm, I, 86; [1918] S, I, 41, noted by E Naquet; 'discussed by' B Nicholas, 'Unjustified Enrichment in the Civil Law and Louisiana Law, I' (1961) 36 *Tulane L Rev* 605, 634f.

⁶ Nicholas (n 5) 635, internal quotation marks omitted.

⁷ P Gallo, 'Remedies for Unjust Enrichment in the History of Italian Law and in the Codice Civile' in EJM Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Duncker & Humblot 1995); K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir tr, (1996) 3rd edn, OUP 1998) 547ff; both cited by Evans-Jones (n 5) [3.38]-[3.39] notes 39-41.

⁸ D Visser, 'The Potential Role of a General Enrichment Action' (2009) 20 *Stellenbosch L Rev* 454, 456-458; cited by Evans-Jones (n 5) [3.39] note 41.

amenable to analysis from those perspectives.⁹ As part II of chapter 9 shows, the relevant Scottish material cannot be understood using subsidiarity. In the second place, beneficial insights from the world elsewhere do not dispense with the need accurately to survey the legal landscape. It was suggested in part III(B) of chapter 9 that Evans-Jones' account of the interaction between established cases and the generalised ground of liability in unjustified enrichment is unconvincing.

III. OUTLOOK

It was suggested in part I(B) of chapter 3 that, in all likelihood, *Goff & Jones*' reluctance is an important rampart against subsidiarity's acceptance in England.¹⁰ But what can English law do to ensure that it does not fall into the trap of subsidiarity? From this study, in particular chapters 2, 4, and to a lesser extent, given underlying debate about the creation of property rights by unjust enrichment, 6, it appears that progress towards a more explicitly mixed approach to the 'unjust question' would be beneficial. In part I(B) of chapter 1, relevant cases, and academic approval, were noted.¹¹ It seems that the law will move in that direction, even though difficult questions may have to be answered on the way.¹² If this prediction is correct, English law should be safe from subsidiarity's shortcomings.

The subsidiarity of the *action de in rem verso* is of such vintage, so recently codified, and so rarely questioned, that French law will almost certainly not abandon it. But what would happen if it did? The legal ground requirement (as discussed in chapters 2, 4, 5, 6, and 8) could largely rise to the challenge of containing *enrichissement injustifié*, though in places, it would require considerable development, such as the recognition of the relevance of statutory policy (discussed throughout chapter 4), and resolution

⁹ See further J du Plessis, 'Comparison and Evaluation: Lessons from Enrichment Law' [2012] *Rebels* Z 947, 960-965.

¹⁰ See Mitchell, Mitchell and Watterson (n 3) [2-04]. See also G Jones (ed), *Goff & Jones: The Law of Restitution* (6th edn, Sweet & Maxwell 2002) [1-061], note 78; (7th edn, Sweet & Maxwell 2007) [1-061], note 78.

¹¹ See also, eg, *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [246]-[247] (Lord Sumption); R Stevens, 'Is There a Law of Unjust Enrichment?' in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co 2008); T Baloch, *Unjust Enrichment and Contract* (Hart 2009) ch 3; building on T Baloch, 'The Unjust Enrichment Pyramid' (2007) 123 LQR 636.

¹² H Scott, 'Defence, Denial or Cause of Action? "Enrichment Owed" and the Absence of a Legal Ground' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart 2016); approved by Mitchell, Mitchell and Watterson (n 3) [29-26]-[29-27].

of doubts about whether a legal ground must entitle a person to an enrichment (discussed and demonstrated generally in part IV(B) of chapter 2, and part III(B) of chapter 4; applied to French law, and further explained in relation to Scotland, in parts III(C) and III(D), respectively, of chapter 4). The maxim *specialia generalibus derogant* (discussed in part III(A) of chapter 9), could mop up any leftover confusion about relations between *enrichissement injustifié* and the *condictio indebiti*. The only real expansion in enrichment liability resulting from the demise of subsidiarity would be into areas from which its absence has already been criticised. It will be recalled from part II(B) of chapter 3 that François Chénéde has very recently thrown mainstream weight behind the disapproval of the practice of denying unjustified enrichment actions where the lack of proof element of the obstacle of law bar is engaged.¹³ He applauds decisions allowing *actions de in rem verso* where, for example, a delict,¹⁴ or contract,¹⁵ could not be proved, or where a person fell entirely outwith a statutory regime.¹⁶ With the caveat that, as discussed throughout chapter 4, the justification requirement's concern in the statutory context extends to whether a statutory *policy* conflicts with unjustified enrichment, as well as the existence of a potentially conflicting set of statutory *rules*,¹⁷ Chénéde's argument convinces: the absence on a set of facts of a contractual or delictual, regime, or incompatible statutory policy, renders it difficult indeed for unjustified enrichment to upset any commitments which the legal system has made. It is hoped that the courts will continue their nuanced interpretation of subsidiarity's lack of proof rule, as evidenced in recent decisions of the *Cour de cassation*.¹⁸ This could at least achieve the concrete gains which the rejection of

¹³ F Terré et al and F Chénéde, *Droit civil: Les obligations* (12th edn, Dalloz 2018) no 1313.

¹⁴ Civ 1re, 3 June 1997, pourvoi n° 95-13568, *Bull civ I*, n° 182; [1997] RTD Civ 657, observations by J Mestre; [1998] JCP G, II, 10102, observations by G Viney.

¹⁵ Civ 1re, 25 June 2008, pourvoi n° 06-19556, *Bull civ I*, n° 185; [2008] RDC 1138, observations by Y-M Laithier; [2008] Defrénois 1980, observations by R Libchaber; [2008] Defrénois 2421, observations by J Massip.

¹⁶ Civ 1re, 14 March 1995, pourvoi n° 93-13410, *Bull civ I*, n° 130; [1996] D 137, noted by V Barabé-Bouchard; [1995] JCP G, II, 22516, noted critically by F Roussel; [1996] RTD Civ 160, favourable observations by J Mestre; [1996] RTD Civ 215 guarded observations by J Patarin; [1996] Defrénois 468, noted by J-L Fillette.

¹⁷ This would, for example, preserve the denial of *actions de in rem verso* in the case of certain contracts, like contracts of loan. See, eg, Civ 1re, 2 April 2009, pourvoi n° 08-10742, *Bull civ I*, n° 74; [2009] Defrénois 1285, observations by E Savaux; [2009] RTD Civ 321, observations by B Fages. As mentioned briefly in chapter 3, with references in footnote 69, loans are subject to particular statutory rules of proof, such as writing, the policy of which formalities might be stultified if unjustified enrichment were allowed when they go unsatisfied.

¹⁸ Eg, allowing unjustified enrichment despite an unproved contract of *ad hoc* partnership, see Civ 1re, 4 May 2017, pourvoi n° 16-15563, *Bull civ I*, forthcoming; [2017] JCP G 790, noted by Y Dagorne-

subsidiarity would bring, though its entire internment would actually be far better for unjustified enrichment in general. For it is likely that only with such a move would the improvements advocated here in relation to the legal ground requirement commence, and these are desirable in themselves.

Lastly, and in particular because it has not been embraced by the Inner House,¹⁹ subsidiarity can still be laid to rest in Scotland. Certainly, if this occurred, the non-entitling conception of the legal ground element of the unjustified enrichment enquiry would need to be maintained generally, and developed in relation to statute specifically (this was discussed and demonstrated generally in part IV(B) of chapter 2, and part III(B) of chapter 4; applied to French law, and further explained in relation to Scotland, in parts III(C) and III(D), respectively, of chapter 4). Furthermore, talk of subsidiarity to understand how the general principle against unjustified enrichment interacts with recognised instances of liability must be eschewed, and no such rigid relationship instated between them (as argued in part III(B) of chapter 9).

In sum, whilst French law is probably fairly fixed on its path, it can nevertheless contain subsidiarity's excesses, and obtain the practical, if not analytical benefits, of its abolition. The ways for England to avoid subsidiarity, and for Scotland to reject it, are to hand. Only time will tell, however, if the former will step back from the edge of the dock, and whether the latter is yet bound for the stratosphere.²⁰

Labbe; [2017] D 1591, noted by A Gouëzel. See further A Gouëzel, 'Retour sur la subsidiarité de l'enrichissement sans cause en cas d'échec de l'action principale faute de preuve' [2017] D 1591.

¹⁹ Recall, eg, from part III(A) of chapter 3, subsidiarity's absence from *Varney (Scotland) Ltd v Lanark Burgh Council* 1974 SC 245 (IH).

²⁰ With apologies to JP Dawson, *Unjust Enrichment: A Comparative Analysis* ((1951) repr, Hein 1999) 8, 12.

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